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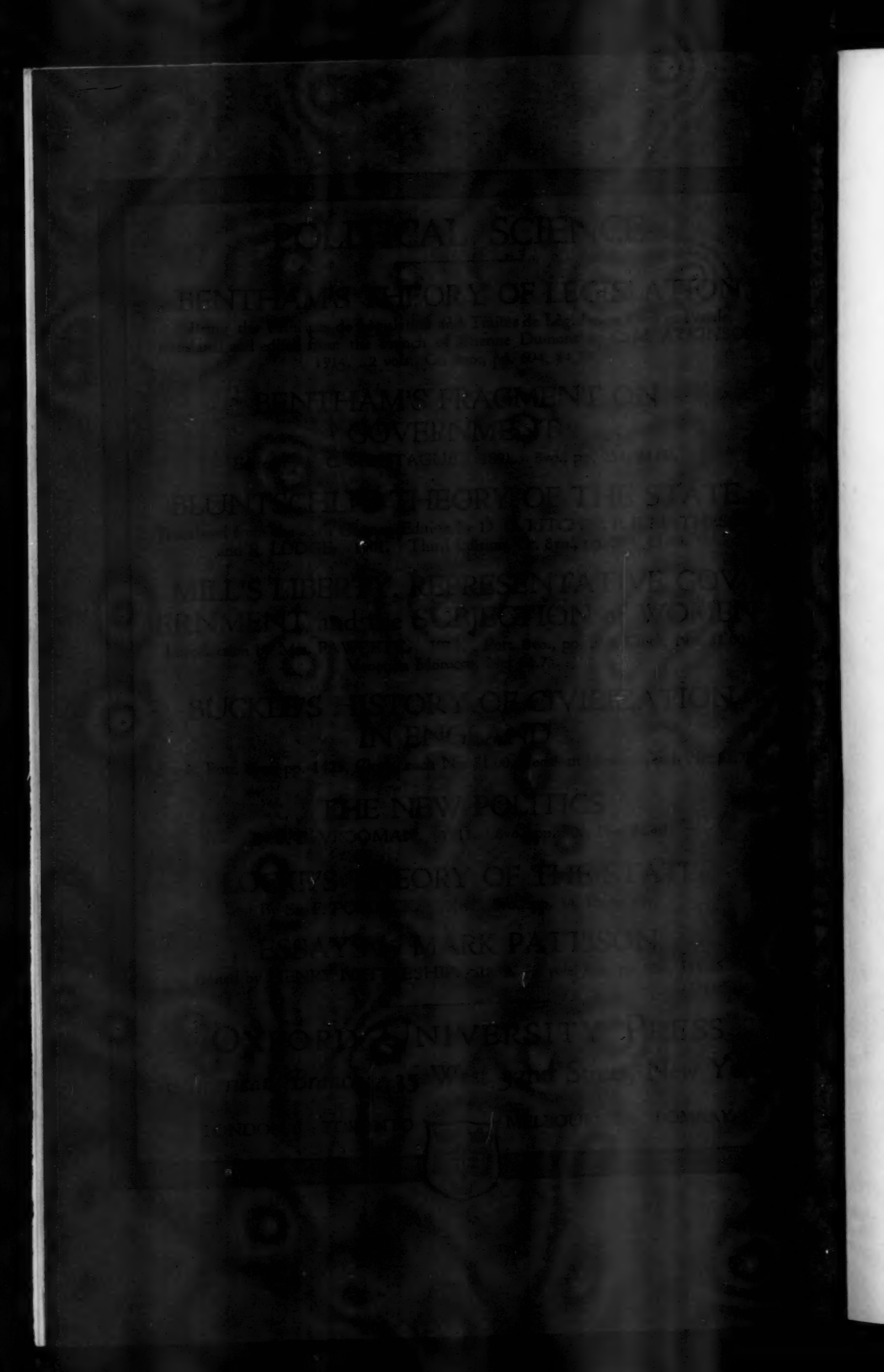

# AMERICAN "GOOD OFFICES" IN ASIA

By Tyler Dennett

The first article of the American treaty with China, June 18, 1858, reads:

> There shall be, as there have always been, peace and friendship between the United States of America and the Ta Tsing Empire, and between their peoples, respectively. They shall not insult or oppress each other for any trifling cause, so as to produce an estrangement between them; and *if any other nation should act unjustly or oppressively, the United States will exert their good offices, on being informed of the case, to bring about an amicable arrangement of the question, thus showing their friendly feelings.*

This solemn engagement, the clumsy language of which leaves open the inference that insults and oppressions are not prohibited if the cause is more than trifling, and also involves the United States, in offering good offices, in prejudgment of the case, appears in slightly different phraseology in Article 1 of the American treaty with Korea, signed May 22, 1882, at the mouth of the Salee River.

By these treaties, therefore, the United States assumed toward the two nations respectively, a peculiar relationship. No other treaty with China contained such a provision, and, while the other treaties of Korea with foreign powers substantially copied from the American treaty the provision for good offices, it was to the United States, as a thoroughly disinterested yet friendly power, that both Korea and China began to look in times of adversity. While no similar provision was included in any treaty between the United States and Japan, nevertheless, the very intimate and friendly relations of Japan with the United States served a similar purpose so that the United States for many years occupied towards Japan a position very similar.

Before tracing the subsequent actions of the government of the United States, in the fulfillment of this peculiar relation, it will be well to review the circumstances which led to the insertion of these clauses into the treaties.

The awkward phraseology of the clause in the treaty with China is accounted for by the fact that it was written by a secretary of the Chinese Commissioners.

The circumstances were tragic. For fourteen years the Chinese Empire had held the foreign powers at bay, limiting them to the five open ports,

and treating their representatives as well as their subjects or citizens with very little respect. Meanwhile, the Empire had been torn with the greatest rebellion the world has ever known. At length England and France rose in wrath. Russia and the United States, while pledged to use only peaceful measures, were in entire agreement that the disdainful, conceited, exclusive policy of China must end. The English and the French occupied Canton, sailed north and reduced the Taku forts in the Pei-ho, and presented themselves at Tientsin with the threat that only the appearance of Chinese plenipotentiaries could prevent an advance upon Peking and upon the Emperor himself. The Russians and the Americans, whose negotiations with the Chinese had been interrupted by the battle of Taku, followed Lord Elgin and Baron Gros to Tientsin, and resumed the negotiations under circumstances made more favorable by the recent Chinese defeat.[1]

Lord Elgin was inexorable. Relentlessly he forced the Chinese Commissioners to retire from one contention after another until it seemed that they were about to sign away their sovereign rights. He demanded the right of diplomatic residence in Peking, and the opening of the Yangtse for trade; it was plain to the Chinese Commissioners that the troubles of China would be multiplied as the foreigners overran the Empire and the possible points of irritation were infinitely multiplied. While the Chinese were in this mood, the Americans brought the final draft of the American treaty to them for approval. A Chinese secretary seized his brush and wrote into the American treaty the clause to which our attention is called.[2]

The circumstances under which a similar clause was inserted into the American treaty with Korea were equally dramatic. The United States made its first effort to negotiate such a treaty in 1871.

Before approaching the government of the country directly, Mr. F. F. Low, the American Minister at Peking, had taken the matter up with the Chinese authorities in Peking, inviting their approval and good offices. This seemed important because of a somewhat evanescent claim to suzerainty over Korea which was asserted by China whenever it did not involve the assumption of any liability for Korean bad behavior. The expedition of 1871 failed utterly, and Mr. Low became convinced that this was in no small part due to the failure of the Chinese Government to give it a sincere approval.[3]

[1] Journal of S. Wells Williams; Journal of the North-China Branch of the Royal Asiatic Society, Vol. XLII, 1911, p. 61; W. A. P. Martin, Cycle of Cathy, p. 185, gives a different and probably inaccurate account of the incident.

[2] For the details of the negotiations of William B. Reed, the American Minister, and S. Wells Williams, the secretary of the legation, see Reed Correspondence, S. Ex. Doc. 30, 36-1; also the Williams Journal.

[3] William Elliot Griffis, Korea, the Hermit Nation, Chap. XLVI; Foreign Relations, 1871, p. 73, Low to Fish, Nov. 22, 1870; p. 111, Low to Fish, Apr. 3, 1871; p. 116, Low to Fish, May 31, 1871; p. 121, Low to Fish, June 2, 1871; p. 124, Low to Fish, June 15, 1871; p. 142, Low to Fish, July 6, 1871.

Having tried to approach the Koreans through China, and having failed, the next attempt to make a treaty with Korea was directed through Japan. In 1880, Commodore R. W. Shufeldt entered the harbor of Fusan in the U. S. S. *Ticonderoga,* armed with credentials to negotiate a treaty, and fortified with letters of introduction from Japan. These letters were significant, for four years before the Japanese had succeeded in negotiating a treaty with Korea in which was inserted: "Chosen, being an independent state, enjoys the same sovereign rights as does Nippon." In other words, Japan had secured from Korea a statement which undermined the assertion of suzerainty made by China. The attempt of Shufeldt to deal with Korea through Japan, was an indication that the United States shared, with reference to Korea, the views held by China's rival.[4]

The first Shufeldt Mission failed as completely as the Low-Rodgers Mission had failed, and many well informed people believed that it had failed because the Japanese did not, any more than the Chinese, desire to see Korea opened freely to the trade of all nations.

At any rate Li Hung Chang did not overlook the implications to be found in the fact that an American Commissioner to Korea had carried a letter of introduction from Tokio. Already the relations between China and Japan were becoming strained over Korea. Russia was also pressing down upon China; the Kuldja dispute was not settled. The astute Viceroy foresaw the struggle with both Japan and Russia in which China would have to engage at no very distant day in order to maintain the asserted suzerainty over Korea. Looking at the peninsula with a soldier's eye, Li Hung Chang saw in Korea the outer ramparts of the Chinese Empire. Whoever held Korea could be a formidable menace to China. But the Viceroy knew that, if the matter were to come to blows with either Japan or Russia, China unaided, would be quite unable to maintain its claim over Korea.

Facing this difficult political situation, Li lost no time in sending an invitation to Commodore Shufeldt to come to Tientsin. Even before a conference took place, he intimated to the American Commissioner that China would give assistance in securing a treaty between the United States and Korea. The Viceroy would appear to have been moved by the following considerations: (1) the opening of Korea could not long be postponed and therefore it was better that the first treaty, which would be the model for the others, should be with the United States; (2) it might also be possible to effect a treaty by which the United States would in some measure become a guarantor that Korea would not be conquered, or sequestered by a third power.

[4] Charles Oscar Paullin, The Opening of Korea by Commodore Shufeldt, Pol. Sci. Quart. Vol. XXV, No. 3, pp. 478 ff.; China Despatches, Vol. 55, No. 21, Angell to Secretary of State, Sept. 27, 1880; Vol. 57, No. 30, Holcombe to Secretary of State, Dec. 19, 1881.

Commodore Shufeldt returned to China in the latter part of 1881 and spent the winter in Tientsin where he had frequent conferences with Li Hung Chang and various drafts of a proposed treaty with Korea were drawn up and compared. The Viceroy's first draft contained the good-offices clause, and in all the various revisions it was retained. The treaty was approved in its final form by Li Hung Chang, sent to Korea with his approval, and Shufeldt followed a day later. He experienced no difficulty whatever in securing the signatures of the Korean Commissioners. The Chinese, as well as the Koreans, were delighted; the Japanese were in equal measure aggrieved. A few years later, however, the Japanese were well pleased for they saw in the treaty, the text of which assumed the independence of Korea, an underwriting of their treaty of 1876.

Such, in its briefest form, was the situation when the United States engaged to use its good offices for Korea.[5]

The impression is so wide-spread that the United States proved a false friend in these engagements to two weak and defenceless states that it is especially important to note the actual history relating to them.

## TIENTSIN, 1859

In the summer of 1859, the representatives of Great Britain, France and the United States met in Shanghai prepared to exchange the ratifications of the treaties of Tientsin. The British and the French were intent upon proceeding to Tientsin, with naval and military escorts suited to their dignity, and thence advancing to Peking where the ratifications were to be exchanged. The Chinese were equally intent on preventing the missions from proceeding to Peking by way of Tientsin, and were hardly less reluctant to have the missions accompanied by more than a very modest guard. The British were very insistent, and very impatient. It is, indeed, difficult to resist the conclusion that they were bent upon picking a quarrel. They accused the Chinese of bad faith and of being unwilling to admit the passage of the missions to Peking. The Chinese replied that they were

[5] Reports of the Shufeldt negotiations with Li Hung Chang and with the Korean Commissioners are to be found in the China Despatches, Vols. 55, 57, 58, 59, filed according to dates; Angell to Secretary of State, No. 30, Oct. 11, 1880; No. 33, Oct. 22, 1880; Holcombe to Secretary of State, No. 30, Dec. 19, 1881; No. 37, Dec. 29, 1881; Shufeldt to Secretary of State, July 1, 1881, Jan. 20, Jan. 23, Mar. 11, Mar. 28, April 10, April 28, May 13, May 22, May 24, May 29, June 8, June 12, and June 26, 1882.

For the international relations of Japan throughout the period under discussion see article by Nagao Ariga on "Japanese Diplomacy" in Alfred Stead [Ed.], Japan by the Japanese, London, 1904, Chap. XI. This chapter, an unblushing account of the motives and methods of Japanese diplomacy from 1860 to 1900, contains evidence of having been prepared from official records, and may be accepted as semi-official in its statements. References to this chapter in the following pages would be so numerous as to be wearisome, and are, therefore, except in a few cases, omitted.

willing that the ratifications be exchanged in Peking, but the path by way of Tientsin was barred.[6]

The British and French envoys attempted to force their way up to Tientsin past the Taku Forts. On June 25, 1859, the batteries opened upon each other and after a bloody battle in the midst of which was born the famous "blood is thicker than water" incident,[7] the allies were forced to retire. The United States Minister, John E. Ward, who was by no means an impartial spectator of the battle, and yet who was bound to the strictest neutrality by his instructions, succeeded in getting into communication with the Chinese and experienced little difficulty in reaching Peking by a route which the Chinese had selected.

Meanwhile, the Chinese, becoming alarmed by their success at Taku and by the ominous silence which followed, invited the good offices of Minister Ward to mediate with the representatives of England and France, with a view to peace.[8] Ward replied that even before his services had been requested he had tried to mediate, but that at that time there had been no one willing to receive his message. He was still disposed to use his good offices if they were requested, but suggested that it would be well for the Chinese first to ratify the treaty. Notwithstanding this apparent desire to deal with the United States on a basis of peculiar friendship. Ward and his party were miserably treated at Peking. When he returned to the South, he wrote in a private letter to Secretary of State Cass, February 13, 1860,[9] that he felt it to be his duty to keep aloof from the approaching struggle unless his good offices were again requested. But the Chinese were at that time too distracted to think of such measures and as for the British and the French, they would have scorned any other than military measures. They were determined to administer to China such a chastisement as the Empire would never forget, and they succeeded completely in the autumn of 1860.

## TSUSHIMA, 1861

The second occasion for the mediation of the United States in Asia did not fall directly under the provisions of any treaty and yet a note of it is important for it shows that in its desire to seek peace and the welfare of the

[6] The British despatches, and the British and French historians all unite in the indictment of bad faith on the part of the Chinese. See, Correspondence with Mr. Bruce, 1859; correspondence respecting China, 1859-60; Cordier, *Expedition de Chine*, 1860; Douglas, Europe in the Far East, p. 113 ff.

The American records, however (see Ward Correspondence, S. Ex. Doc. 30, 36-1, pp. 575 ff., particularly p. 611; Williams Journal, p. 143), make it practically certain that the Chinese were acting in all sincerity and according to the provisions of the treaty.

[7] For brief account, see U. S. Naval Institute Proceedings, Vol. 40, p. 1085.

[8] Ward Correspondence, Desp. of Aug. 20, 1859, p. 594. Williams Journal, p. 153.

[9] China Despatches, Vol. 19, Ward to Cass, Feb. 13, 1860.

Asiatic States, the United States was bound by the spirit more than by the letter of a treaty.

In 1861 Russia occupied the Island of Tsushima midway between Japan and Korea. The island was of the utmost strategic importance, for it commanded the Sea of Japan. (It was in this vicinity that Admiral Rodjestovesky's fleet was destroyed by the Japanese May 27-8, 1905.) The Russians built barracks and planted seed, as though they had every intention of remaining permanently.[10] Townsend Harris, American Minister in Yeddo, reported the presence of the Russians to Secretary of State Seward, October 7, 1861. He wrote:

> For the last eighteen months many officials, English and French, and civilians and naval men, have frequently declared that war with Japan was inevitable, and that it could only end in the partition of the country (Japan). It is said that the Russian Commander justified his action by referring to those declarations, adding that he remains at Tsushima solely for the purpose of preventing its falling into the power of the English or French.[11]

Shortly after this Mr. R. H. Pruyn arrived in Japan to relieve Harris. Seward, whose whole Far Eastern policy is worthy of careful study, wrote to Pruyn, with a confidence in his ability and in the good-will of Russia which now seems astonishing, as follows:

> If the occupation of Tsushima still is an object of anxiety to his Majesty the Tycoon, I will at once call the attention of the President to the matter, and with his authority which I doubt not will be granted, I will, in the name of this government, as the friend of Japan, as well as of Russia, seek from the latter explanations which I should hope would be satisfactory to Japan.[12]

But before this proposal, so significant as an item in American history, reached Japan, Admiral Sir James Hope, supported by a formidable fleet, had ordered the Russians to leave the island and they had obeyed. Meanwhile the Japanese, who had other matters of dispute with Russia, had entered into friendly negotiations with the great state which had recently become their neighbor, and the good offices of the United States became unnecessary.

It cannot be denied that the action of the British fleet was more appropriate for the occasion than the offer of Mr. Seward. The difficulties of securing the consent of Russia to the mediation of any of her Far Eastern projects became evident to the United States only a few years later.

### Sakhalin, 1870

Russia, unceremoniously driven from Tsushima, was all the more intent on securing a clear title to the island of Sakhalin, which lies along the coast

[10] Griffis' Hermit Kingdom, p. 205; Douglas' Europe in the Far East, p. 190.

[11] Japan Despatches, Vol. 4.

[12] Japan Instructions, Vol. 1, Feb. 5, 1862.

of Siberia southward from the mouth of the Amur. The Russians had lodged a claim for this island as early as 1804.[13]

In September, 1870, after long and fruitless negotiations with Russia, in which Japan was inducted into some of the most questionable methods of European diplomacy, the latter country made a formal application to the United States, through United States Minister C. E. DeLong, for mediation, and Secretary of State Fish immediately took the matter up in an informal way with Russia.[14] Through the American minister in St. Petersburg, Russia replied graciously, explaining that it would not be possible to submit the matter to mediation because a precedent would thus be established which some unfriendly European powers might subsequently turn to the disadvantage of Russia.

Meanwhile, the Japanese evidently placed little reliance on the effective good offices of the United States for, without notifying the American Minister, they took the matter up with Russia directly, and invited her to send a plenipotentiary to Yeddo to settle the matter.

### Maria Luz Case, 1872.

Two years later, Japan accepted a plan of mediation in the *Maria Luz* case.[15]

A Peruvian coolie ship from China was forced to put in at Yokohama. The Japanese promptly freed the coolies. Peru sought the good offices of the United States in the settlement of the consequent claim against Japan. The American government accepted the duty with the express stipulation that it could do nothing which would imply approval of the coolie trade. At the suggestion of the United States, the claim was referred to the Emperor of Russia, who awarded the decision to Japan, May 29, 1875. The reference of this matter to Russia became especially easy because in 1864 Mr. Pruyn had agreed to submit a disputed claim of the United States against Japan to the arbitration of the Czar. As a matter of fact the American claim had been settled without reference to St. Petersburg, but the discussion had given the United States an opportunity to show its willingness to conform its practice to its preaching.[16]

### American Policy in the Far East

The above noted instances of the use of good offices are of relatively slight importance except by way of preface to the very important disputes

[13] For a history of the controversy see Stead, *op. cit.* pp. 149 ff.

[14] Japan Despatches, Vol. 13, No. 7, Jan. 11, 1870; Japan Instructions, Vol. 1, No. 85, Jan. 17, 1871; Russia Instructions, No. 65, Nov. 11, 1870; Russia Despatches, No. 91, Dec. 9, 1870.

[15] Moore's Digest, Vol. 2, p. 655.

[16] Jackson Payson Treat, Japan and the United States, pp. 70, 100, 101; Treat, Early Diplomatic Relations between the United States and Japan, 1853-65, p. 249; Diplomatic Correspondence, 1863, II, p. 1079; For. Rel., 1873, Vol. 1, p. 613.

which arose in the following twenty-five years. They served, however, to introduce the principle of mediation into Far Eastern questions, and they revealed the disposition of the United States at a time when all of the Oriental states were receiving from western powers lessons in diplomacy and international relations of a much less elevated sort.

In the events which occurred after 1872, the United States stood out preeminently as a disinterested peace-maker. This rôle suited the American spirit as it was being exhibited in domestic affairs and in trans-Atlantic relations; it was, moreover, the cornerstone of American policy in Asia. It was clearly seen that the interests of the United States could be only injured by war. War between Japan and China would result in the weakening of both nations, and would probably lead to the intervention of European powers in their own interests. The United States desired above all else strong and progressive native governments in Asia. War would paralyze progress and further impoverish the nations which joined in it. War between any western and any eastern power would be even more disastrous. American national interests, therefore, happily coincided, as they do today, with the highest welfare of the Asiatic states.

Indeed, one may indulge at this point in a very sweeping generalization. There were, and are, two possible general policies for the foreign powers in the Far East. One is to keep the Asiatic states in as weakened a condition as possible, with a view to making commercial conquest easy. The other policy is to assist these nations to achieve the greatest possible national strength, with a view to the building up of strong self-supporting and self-governing sovereign states. The American policy in Asia has uniformly been of the latter sort, and at times the United States has stood absolutely alone in the advocacy of such a course. Even today there are not a few whose proposals of policy in Asia rest upon the assumption that a weak East will help in the maintenance of a strong West. Furthermore, it is between these two policies that Japan, preferring to count herself as a power rather than as an Asiatic state, is halting. The question before Japan is: Does her national well-being require a weak or a strong China? This is but another phase of the older question asked by the western powers when they inquired whether their well-being required a weak or a strong Asia in which Japan was considered as an integral part.

Perhaps the best proof of the sincerity of this characteristic American policy of strengthening Asia has been its repeated and long continued efforts to introduce mediation and arbitration into the ominous Asiatic disputes.

One other general consideration is important for the understanding of the peace-making rôle of the United States in Asia. When the foreign powers appeared in the Far East in force after the Crimean War, Eastern Asia was, politically, in a nebulous state which might be compared to that of a solar system before the orbits of the planets had become fixed or the

satellites properly distributed. There were certain central masses with a moderate degree of specific gravity, and there were also smaller masses which swung on irregular orbits in between the larger spheres, influenced in their movements by each of the larger masses, but still not wholly attached to any larger neighbor. The large spheres were China, Russia in Asia, England in Asia, and Japan. The potential satellites were the islands off the coast of Asia—Sakhalin, Yesso, Tsushima, the Bonin Islands, the Lew Chew group, Formosa—and, the so-called tributary states surrounding China—Burmah, Annam and the regions near it, Tibet and Korea. Before the Europeans came and attempted to apply the rules of international law, these regions and islands had given to the larger Asiatic states only a moderate degree of trouble. Communications were difficult before the arrival of the steamship and the cable and both China and Japan were quite content with the political *status quo*. But the entrance of the Europeans and their modern contrivances radically changed the situation. Immediate reasons appeared for a closer organization of the politically nebulous East. The result was a consolidation of Japan and China, respectively, and then a proportionate increase in the power of gravitation by which these masses pulled upon the intervening islands and the outlying regions. The laws of physics operated in international matters. The pull upon Formosa, the Lew Chews,[17] Korea, Burmah, Annam, etc., was in direct ratio to the specific gravity of the neighboring masses, and in inverse ratio to the distance. In this process of organization, China fared badly because, while its mass was great, it was also nebulous and loosely organized, whereas Japan, Russia in Asia, England in Asia, and France in Asia, although relatively small, were more compact and of greater political specific gravity. It was, of course, inevitable that between these pulls and counter-pulls collisions would be inevitable. In these collisions the interests of the United States were seldom benefited. War of any sort meant the impoverishing of peoples, the sequestration of territory, the upsetting of markets, and presumably the closing of doors. While it is undeniable that the United States has received some benefits from some of the wars in Asia since 1839, it seems more reasonable to believe that the best interests of the United States in every case where there has been a conflict of arms would have been better served by peace. At any rate, the assumption that this would be true underlay American policy in the Far East from the very beginning.

## Formosa, 1874

In 1874, Japan and China came into collision over the Island of Formosa. Many Japanese had already ear-marked the island for Nippon, for it commanded one avenue of the trade route to north China and Japan. Indeed, Japanese had already laid out, somewhat informally, a plan of

[17] Also spelled Loo Choo, Liu Chiu; Japanese, Riu Kiu.

annexation or conquest of territory from the mouth of the Amur southward, which included practically all that has in the last fifty years been obtained.[18]

In 1874, Japan finding it necessary to make war to avert a revolution chose between Korea and Formosa and preferred the latter because of its warmer climate and its sugar cane. Japan confronted China with the principle of international law that sovereignty over territory was not to be recognized where the power claiming sovereignty did not exercise the functions of government. To this claim China replied with a quotation from her classics which she understood better than international law. Thus wrote Prince Kung to the Ministers of the Japanese Department of Foreign Affairs, May 14, 1874:

> Formosa is an island lying far off amidst the sea and we have never restrained the savages living there by any legislation, nor have we established any government over them, following in this a maxim mentioned in the *Rei Ri:* "Do not change the usages of a people, but allow them to keep their good ones." But the territories inhabited by these savages are truly within the jurisdiction of China.[19]

Japan found a pretext for her war on Formosa in the murder by the aboriginal inhabitants of the island of some ship-wrecked Lew Chew Island sailors. Unfortunately, the American Minister in Japan, who greatly sympathized with the Japanese in their aspirations, was sufficiently compromised in the planning of the expedition so that his recall became necessary. Three Americans were engaged by the Japanese to assist in the expedition and an American steamer was chartered as a transport. However, before the expedition left Nagasaki the Americans were ordered to be detached from the party, and the American steamer was returned to its owners. The action of the American government was somewhat embarrassed by the fact that no formal declaration of war existed, but the Chinese government expressed satisfaction at the measures taken to restrain American citizens from assisting Japan.

In October, 1874, a Japanese envoy arrived in Peking to settle the Formosan dispute. There was a war of words and then a rupture of the negotiations. As the Japanese envoy was about to leave Peking, Dr. S. Wells Williams, suggested arbitration but the envoy stated that the matter was "too complicated" for arbitration and was very unlike the *Maria Luz* affair.[20]

But the Japanese were not to be permitted to settle the Formosan affair in their own way. Sir Thomas Wade, the British Minister, had already, so it is believed, intimated to the Japanese that Great Britain would not view

[18] The evidence for this statement is to be found in Walter Wallace McLaren, A Political History of the Meiji Era, p. 195 ff.; Stead, *op. cit.*, Chap. XI.

[19] China Despatches, Vol. 36, No. 55, Aug. 22, 1874, Williams to Fish.

[20] China Despatches, Vol. 37, No. 70, Oct. 29, 1874, Williams to Fish.

the Japanese occupation of Formosa with satisfaction owing to the close trade relations of Formosa with the British merchants in China, and now he intervened and became the mediator of the dispute. An agreement was signed October 31, 1874.[21]

## Lew Chew Islands, 1879

Closely associated with and intimately related to the Formosan dispute, was the controversy over the possession of the Lew Chew Islands, which lie north of Formosa, and command another avenue to the sea-borne trade with China.

The Lew Chews were one of those satellite states like Korea, Annam, Siam, and Burmah. The Lew Chewians had their own king, but he received investiture from the Emperor of China, and further testified to his dependence by sending periodical tribute-bearing embassies which handed over their gifts to the customs *tautai* at Foochow, by whom they were sent to Peking.[22]

The American relation to the Lew Chew controversy was more intimate than to the Formosan question. In 1854, Commodore Perry had made a treaty with the King of the Lew Chews in which the suzerainty of China was not recognized except by the fact that the treaty was dated according to the Chinese calendar and was written in Chinese. Perry regarded the Lew Chews as of great strategic importance and it is to be feared that his plan for the future of the Lew Chews contemplated something very like an American protectorate over the islands. He saw in Great Lew Chew a possible American "Malta," or "Colombo," or "Hong-kong." In these days it is difficult for Americans to realize the force of the arguments which Perry used, but at that time American ambitions in the Pacific, while by no means a part of official American policy, were most pronounced.[23]

The Japanese also had a claim upon the Lew Chews because of the fact that the inhabitants of the islands had been accustomed to pay tribute yearly to the Prince of Satsuma. When feudalism was abolished in Japan, this claim of Satsuma upon the islands was vested in the Mikado, and the Japanese, who had not overlooked the strategic value of the islands, as well as the attention which Commodore Perry had paid to them, proceeded to assert their authority over the Lew Chews to the exclusion of the historic

[21] Parliamentary Papers, China No. 2 (1875), Correspondence respecting settlement of the difficulty between China and Japan in regard to the Island of Formosa. Further Correspondence presented Mar. 9, 1875. Foreign Relations, 1875, p. 221, Williams to Fish, Nov. 12, 1874.

[22] For a discussion of this most complicated question of the exact status of the Lew Chews *vis a vis* China, see Foreign Relations, 1880, p. 194, Dec. 11, 1879, Seward to Secretary of State.

[23] Perry Correspondence, Sen. Ex. Doc. 34; 33-2, pp. 12 ff., 28, 29, 30, 31, 32, 66, 81, 108-110, 112, 174.

Chinese claim of suzerainty. The conflicting claims of China and Japan were a subject of discussion for many years. In the treaty between China and Japan in 1874, for the settlement of the Formosan trouble, Japan cleverly inserted the following sentence: "The raw barbarians of Formosa once unlawfully inflicted injury on the people *belonging to Japan*, and the Japanese Government, with the intention of making the said barbarians answer for their acts, sent troops to chastise them." The treaty also stated that Japan had acted justly in the matter. Thus Japan cut the ground from under the Chinese claim of suzerainty over the Lew Chews, for the people referred to as belonging to Japan were Lew Chew sailors.[24] The Chinese claim, in the judgment of the Japanese, no longer had a standing in international law, and when the Chinese discovered the way in which they had been outwitted, they fell back on sullen defiance. In 1879, the Lew Chew king was deposed by the Japanese because his emissaries had been seeking the good offices of the American and other ministers in Tokio, with a view to having the old relationship to China restored. The United States had contented itself, when Japan formally annexed the islands, with receiving assurances from Japan that American rights in the islands would in no way be disturbed, and never interfered with the program of Japan, regarding the controversy as purely between China, the King of the Lew Chews and Japan.

The points of irritation between China and Japan multiplied after the Formosan affair in 1874, and when General Grant visited Peking in 1879, the two nations were on the point of war. Grant saw very clearly that the European nations might seize the opportunity to enhance their own interests. It was, therefore, a matter of satisfaction to General Grant when the Chinese proposed and the Japanese agreed to submit the Lew Chew question to mediation.

After many conferences with the Chinese in Peking and a thorough review of the question in Tokio, General Grant wrote a letter, August 18, 1879, to Prince Kung, practically Prime Minister of China, which, before being sent, was shown to the Emperor of Japan and received his approval.[25] In this letter Grant submitted the following proposals: (1) China to withdraw certain threatening and menacing dispatches which had been addressed to Japan on the subject; (2) each country to appoint a commission, and the two commissions to confer on the subject; (3) no foreign power to be brought into the discussion, but in case the commissions could not agree they might appoint an arbitrator whose decisions should be binding on both Japan and China.[26]

[24] Stead, *op. cit.*, p. 171.

[25] China Despatches, Vol. 61, No. 33, Oct. 9, 1882, Young to Frelinghuysen.

[26] John Russell Young, Men and Memories, Vol. 2, pp. 294-5. John Russell Young, Around the World with General Grant, Vol. 2, pp. 410-412, 415, 543-46, 558-60.

General Grant then took the opportunity to point out to China the necessity for peace. His language is interesting for its earnestness and as an indication of General Grant's conclusions on the impending conflict in Asia. He wrote:

In the vast East, embracing more than two-thirds of the human population of the world, there are but two nations even partially free from the domination and dictation of some one or other of the European Powers, with intelligence and strength enough to maintain their independence—Japan and China are the two nations. The people of both are brave, intelligent, frugal, and industrious. With a little more advancement in modern civilization, mechanics, engineering, etc., they could throw off the offensive treaties which now cripple and humiliate them, and could enter into competition for the world's commerce. . . .

Japan is now rapidly reaching a condition of independence, and if it had now to be done over, such treaties as exist could not be forced upon her. What Japan has done, and is now doing, China has the power—and I trust the inclination—to do. I can readily conceive that there are many foreigners, particularly among these interested in trade, who do not look beyond the present and who would like to have the present condition remain, only grasping more from the East, and leaving the natives of the soil merely "hewers of wood and drawers of water" for their benefit. I have so much sympathy for the good of their (the foreigner's) children, if not—for them, that I hope the two countries will disappoint them.

It has been stated, and probably correctly, that General Grant went even so far as to recommend that Japan and China form an alliance against the western powers.

The Government of the United States, fearing that the good offices of the United States were being accepted by the two powers under a misapprehension that General Grant in some way officially represented the United States, instructed its representatives to make clear that he had acted in an entirely personal capacity.[27]

Both nations accepted General Grant's proposal and the two commissions met in Peking. After three months' discussion, they arrived at a settlement according to which the islands were to be divided.[28] However, on the day fixed for the signatures, China suddenly withdrew the question from the commission and referred it to Chinese superintendents of trade at the northern and southern districts.[29]

"A glaring instance of international treachery" on the part of China, the North China Daily News (Jan. 27, 1883) called it, but it was subse-

[27] Foreign Relations, 1881, p. 243, Apr. 4, 1881, Blaine to Angell.

[28] It has been frequently stated (cf. Robert P. Porter, Japan, the Rise of a Modern Power, p. 119; H. B. Morse, *op. cit.*, Vol. II, p. 322) that General Grant himself proposed the partition of the islands between China and Japan. As a matter of fact, the most important point in the mediation by General Grant was that China and Japan should, if possible, settle their own disputes without the admission of any European into the controversy.

[29] Foreign Relations, *ibid.*, p. 229, Jan. 25, 1881, Angell to Secretary of State. See 1873, pp. 188, 553, 564; 1879, p. 637; 1880, p. 194, for details of entire controversy.

quently discovered that Japan, not content with the settlement of the Lew Chew question by itself, had, at the last minute, insisted upon the inclusion in the agreement of some additional provisions conferring new ports and trading privileges in China upon Japan.

China had been predisposed to settle the matter in 1880 because of the then strained relations with Russia, although the surrender of Chinese territory to a foreign power during the minority of the Emperor was a risk such as few Chinese statesmen would have dared to assume. As soon as the trouble with Russia was settled, the Lew Chew question again became the subject of great irritation. Li Hung Chang outlined China's position as follows: China would not under any circumstances consent to the destruction of the autonomy of the islands, or the division of them between Japan and China. He desired that the islands should be restored to their original condition of tributary states to both China and Japan. Failing this, he thought China would agree to enter into treaty stipulations with Japan, by which both powers would guarantee the absolute independence of the Lew Chews.[30]

In 1882, Li Hung Chang was prepared to fight Japan for the possession of the islands and war seemed imminent. The international situation remained the same. A war between China and Japan would be destructive to the best interests of both nations, and also detrimental to the interests of the United States. John Russell Young, then American Minister in Peking, who, as a newspaper correspondent, had accompanied General Grant around the world, and who was on very intimate terms with Li Hung Chang, strongly urged the Viceroy not to enter into hostilities with Japan. The question had passed beyond the stage where it might be controlled by considerations of justice. China had signed away her rights in the treaty of 1874. Japan had formally annexed the islands and had been administering them for several years. But more important even was the fact that China was in no condition to enter a war. Peace at any price was the only safe policy for the Empire.

The Lew Chew question was soon lost in the greater problem which confronted China in the aggressions of France upon her southern border, and the annexation of the Lew Chews by Japan became a *fait accompli*.

## The Franco-Chinese War

While China was engaged in the controversy with Japan over the Lew Chews, other and even more serious problems arose with the foreign powers —with England over Burmah and the murder of Margery in 1874, with France over Tonquin, at about the same time, with Russia over Kuldja in 1879, and then again with France over Annam in 1884. Indeed, it was these distractions, probably, which diverted China from making war on

[30] China Despatches, Vol. 58, No. 19, Nov. 24, 1881, Holcombe to Secretary of State.

Japan on account of the Formosan affair, or the Lew Chews, or Korea. To none of these larger disputes except the one with France was the United States in any way related.

At one time France appears to have selected Korea as a field for exploitation and even for annexation. In 1866, the French Chargé d'Affaires in Peking even announced to the astonished Yamen that France was about to annex Korea, but this representation was unauthorized by France, and a few years later France would seem to have concluded to seek territorial expansion only in the south. France made a treaty with Annam in 1862, and made a second one twelve years later in which France recognized the complete independence of Annam, and also acquired Cochin-China. China protested because the treaty, in effect, made France rather than China the suzerain over Annam. The matter remained in dispute until the latter part of 1883, when Li Hung Chang signed a convention with France according to which the Chinese troops were to be withdrawn from Annam, and the two nations were, jointly, to guarantee the independence of this territory which for two centuries had paid tribute to Peking. There was a sudden change of government in France and the convention was repudiated at Paris. The new French cabinet proposed an expedition to China, and a liberal credit was voted. Then a French officer, Riviere, was killed in an engagement with the Black Flags, an irregular company of troops which were supposed to be more or less supported by the Chinese government. War became all but inevitable. Indeed, it seems quite plain that France was seeking to provoke war for the sake of securing more territory in the South.

China, stung by the charges of bad faith, defiant and unhumbled, still quite ignorant of the weakness of the Empire, perhaps misled by encouragements from Germany and England, and quite underestimating the strength of France, was determined to yield no territory to France, and also not to yield suzerainty over Annam. At this point, John Russell Young, the American minister, whose relations with Li Hung Chang had become very intimate and confidential, and whose relations with the Tsung-li Yamen were cordial, pleaded for peace. The question was, as he tried to explain, not whether China was in the wrong or in the right, but whether she could afford a war with a foreign power. She had relatively few troops with a modern training, and they were in the North. There was no railroad to transport them to Annam, and the Chinese navy could not protect them by sea. France was studiously cultivating Japan, with a view to securing joint action against China. Russia was an eternal menace to the Chinese northern frontier. England was busy in Egypt, and presumably not unwilling that France should become involved in China. For China itself, war could only end in disaster.[31]

[31] Mr. Young refers to this conference in Men and Memories, *op. cit.*, p. 308.

At length, the councils of Mr. Young had their effect and he was asked to invite the good offices of the President to secure a mediation of the dispute.

To this request, Secretary of State Frelinghuysen replied, by cable, July 12, 1883:

> This government cannot intervene unless assured that its good offices are acceptable to both. In such case would do all possible in the interests of peace. The United States Minister at Paris has been directed to sound French Government, and ascertain if it will admit our good offices in the sense of arbitration or settlement.

The answer was not long delayed. France declined to accept the good offices of the United States.[32]

The French, forthwith, proceeded to declare a blockade of Tonquin and Annam, and although negotiations continued at Shanghai, the troops of the two nations came into active conflict in December, 1883. On May 11, 1884, Li Hung Chang signed with Commandant Fournier a convention which was intended by the Chinese to be the protocol to a treaty. In the Fournier Convention, France waived a claim for indemnity in return for the acknowledgment of her territorial and commercial claims in Annam. There was entire disagreement between the Chinese and the French as to the interpretation of this protocol, and even as to its authorized text, and on June 23rd, 1884, Colonel Dugenne and twenty-two French soldiers were killed in an engagement at Baclé.[33]

Again China appealed to the good offices of the United States, and again (July 20, 1884) Minister Young referred the matter to Washington. China wished to submit to arbitration the question as to whether she had acted in bad faith with reference to the Fournier Convention.

Again France declined to admit the good offices of the United States.

China was thus brought face to face with war. The American Minister renewed his efforts to find a peaceful solution, feeling that peace at any price which France might demand would be better than conflict. At length Prince Kung asked Mr. Young to go to Shanghai, see M. Patenôtre, the French representative, and obtain a settlement. China was even willing to agree to any indemnity which Young might recommend. The American Minister referred the request to Washington for approval, but Secretary of State Frelinghuysen was wary, having already been twice repulsed by France, and withheld his approval. On August 5th, Admiral Lespès at-

[32] Cordier, *Relations de la Chine avec les puissances occidentales*, II, p. 399.

[33] H. B. Morse, International Relations of the Chinese Empire, Vol. II, pp. 353-57, who was present at the Li Hung Chang-Fournier negotiations and saw the documents, gives personal testimony as well as evidence to prove that the French Government was guilty of extremely bad faith in the observance of this convention. His verdict is: "It is only on the ground that an Asiatic nation has no rights which the white man is bound to respect that the course of France is to be explained." For the French statement of the case, see Cordier, *op. cit.*, II, pp. 435 ff.

tacked Keelung in Formosa. After this attack, all hopes of peace vanished. The Chinese were aroused. Prince Kung was retired, and the retirement of the Prince meant the eclipse of Li Hung Chang who had clearly realized the folly of resisting the French.

Early in September, the China Merchants Steam Navigation Company which had been purchased a few years before from an American firm, Russell and Company, was resold to the former owners, and the American flag raised over the fleet of steamers. France, thus deprived of the opportunity of making a most profitable reprisal upon China, was now even less than ever willing to accept any good offices from the United States. However, the American Government kept in very close touch with the rapidly developing situation, and on several subsequent occasions was the medium of communication between Paris and Peking. Sir Robert Hart also undertook the task of mediation and after more than a year of work succeeded in bringing about the signing of a protocol, April 4, 1885.[34]

Mr. Young, although his efforts at mediation between China and France had failed, was determined to demonstrate the good faith of the United States in its advocacy of arbitration as a means of settling disputes, and was able to secure the consent of the Chinese Government to the arbitration of the "Ashmore Fisheries Case" by the British and Netherlands consuls at Swatow. The case involved the action of the Chinese officials in depriving Dr. W. Ashmore, an American missionary at Swatow, of a fishery which he had purchased in connection with a mission. An award of four thousand six hundred dollars ($4,600) was made to Dr. Ashmore, June, 1884.[35] Earlier in the same year, Mr. Young had proposed that the claims of the foreigners arising out of the riot at Canton in September, 1883,[36] be submitted to arbitration, but he was unable to secure the consent of the Chinese to such a statement of the disputed points as would have satisfied the British authorities.[37]

## The Sino-Japanese War, 1894-5

Although the "good offices" clauses in both the Chinese and the Korean treaties with the United States had been placed there by the Chinese, it

[34] Morse, *op. cit.*, pp. 364-7.

[35] Moore's Arbitrations, Vol. 2, p. 1857-59.

[36] Foreign Relations, 1883, p. 209; 1884, p. 46; Morse, *op. cit.*, p. 320.

[37] For the more important details of Mr. Young's negotiations in the French controversy, see China Despatches, Vol. 65, No. 230, Aug. 8, 1883, No. 232, Aug. 16, 1882, No. 252, Sept. 7, 1883, No. 268, Oct. 8, 1883; Vol. 67, No. 308, Dec. 24, 1883; Vol. 68, No. 318, Jan. 6, 1884; Vol. 71, No. 496, Aug. 21, 1884, No. 501, Sept. 4, 1884; Vol. 73, No. 569, Dec. 9, 1884, No. 583, Dec. 22, 1884. It is difficult to explain the omission of all of these very able despatches from Foreign Relations. Perhaps the failure of Frelinghuysen's negotiations with France, together with the fact of a change of administration in 1885, explains it. There are few finer chapters in the history of arbitration than the Young-Frelinghuysen efforts in 1883-4.

cannot be denied that their presence in the treaties reflected correctly the disposition of the United States in the Far East to seek peace and to maintain the most impartial neutrality. Nevertheless, because of the chronic political instability of international relations in Eastern Asia, and because of the ulterior motives which had led to the insertion of the clauses in the treaties, these provisions were a constant menace to traditional American policy in foreign affairs, and unless rigidly interpreted by the United States could not have failed to draw the American government into armed intervention in Asia. In none of the cases already considered where the good offices of the United States were invoked does this appear but it becomes very evident when we come to the case of Korea. A few facts as to the situation will make this clear.

After 1872, it was inevitable that some day China and Japan would come into armed conflict over the possession of Korea. Indeed, the treaties of the western powers with Korea had been made upon the advice of Li Hung Chang, for the express purpose of enlisting the western powers on the side of China in its efforts to prevent Korea from being separated from China by Japan.

At least by 1885, it became evident that China and Japan were not to be permitted to settle the question of Korea without the intervention of European powers. Russia, also, wanted Korea, and the ambitions of Russia drew Great Britain into the situation. Furthermore, the general policy of the European powers before 1900, and this applied also to England before 1894, was to repress the growing strength of Japan. It is a safe generalization that all the powers, except the United States, preferred a weak Asia. This consideration led to a disposition to thwart the efforts of Japan to acquire a defensible foothold in Korea. England was disposed to see Korea remain under Chinese suzerainty. Russia sought to transfer the suzerainty over Korea from China to herself, and the attitude of Europe generally is reflected in the demand for the retrocession of the Liao-tung peninsular to China in 1895.

The American policy was quite different. It was based on the desire to see the development of a strong Asia. While the independence of all of the Asiatic states, including Korea, seemed desirable, this desire was quite subordinate, in American policy, to the growth of indigenous strength in Asia as a whole sufficient to withstand the aggressions of the foreign powers. The American treaty with Korea assumed the independence of Korea. American policy, however, went farther than that. Its effect was to separate Korea entirely from its traditional relationship to China. It would appear that the American government perceived that the shadowy and obstructive suzerainty of China over Korea would never be a source of strength to China, and would, on the other hand, be an element of weakness not only to Korea, but also to Asia as a whole. Consequently, when the question of intervention with a view to establishing the absolute independ-

ence of Korea arose, the Government of the United States found that a strict construction of its treaty obligations to China, Korea and Japan, coincided exactly with its major policy in Asiatic affairs. In the first place, the United States was friendly with all three states. It was pledged to use its good offices but these could be effective only if they were acceptable to both parties. It was therefore the duty of the United States to maintain the most scrupulous neutrality. In the second place, intervention with a view to diverting the natural course of events, appeared to be merely playing into the hands of European powers, which desired to repress Japan and also to weaken Korea with a view to the sequestration of Korean territory at some future date. To have followed this second course would have meant not only the repudiation of the friendship which had existed so long with Japan as well as with China and Korea, but it would also have meant continued armed intervention in Asia, in co-operation with European powers, and yet for the express purpose of thwarting European ulterior designs. In effect, such a course would have led to the abandonment of the traditional American policy at many points.

With these choices in mind, let us examine the course of the United States in the Sino-Japanese war of 1894-5.

Early in 1894, the Korean Tonghaks raised the standard of insurrection. While generally anti-foreign in purpose, the Tonghaks were particularly anti-Japanese. Yuan Shi Kai, as the representative of Li Hung Chang and of the Chinese Government, immediately assumed responsibility for the protection of foreigners, and it became evident that the insurrection would assume the larger aspects of a contest between China and Japan for the control of Korea. On June 22, 1894, the American Minister in Seoul was instructed:

> In view of the friendly interests of the United States in the welfare of Korea and its people, you are, by direction of the President, instructed to use every possible effort for the preservation of peaceful conditions.[38]

The Koreans, caught between the mill-stones, and quite powerless to act effectively for peace, appealed to Russia, France, England and the United States for help, and Mr. Sill, the American Minister, joined with the representatives of the other powers in asking China and Japan to agree to a simultaneous withdrawal of their troops from Korean soil. Both China and Japan refused.[39] On July 5th, the Korean representative in Washington asked that the President "adjust the difficulty" arising out of the fact that the Japanese Minister in Seoul had presented to the Korean King a long list of administrative reforms and was pressing that they be immediately adopted.[40] At about the same time the Chinese Government at Peking sought the good offices of England and Russia to secure

[38] Foreign Relations, 1894, Vol. 2, p. 22.
[39] *Ibid.*
[40] *Ibid.*, p. 29.

a peaceful solution. The British Minister in Peking urged, through Charles Denby, Jr., American Chargé, that the United States take the initiative in uniting the great powers in a joint protest at Tokio against the beginning of hostilities in Korea by Japan. On July 8th, Denby wired that Li Hung Chang had officially expressed the desire that the United States take the initiative as the British Minister had suggested.[41]

A study of these requests in the light of the history of the preceding twenty years shows their intention to have been as follows: the United States was asked, both by Korea and by China, to take the lead in preventing Japan from enforcing administrative reforms on Korea. That reform in Korea was desirable was undeniable; that China would ever effect these reforms was unlikely; that the European powers were being moved by any sincere desire to rescue Korea from the clutches of Japan for the purpose of creating in the peninsula a strong, independent Asiatic state, was equally improbable. The joint note of the foreign representatives in Seoul had failed to secure the simultaneous withdrawal of the Chinese and Japanese troops. It was evident that any intervention in the affair involved forceful intervention. Furthermore, the forceful intervention desired by Korea, by China, by Russia, by Germany, by England, was to eliminate Japanese influence in Korea for the express purpose of obstructing reform, and for the ulterior purpose on the part of some of the powers, of weakening the resistance of Asia, at the key-stone of the arch, to the aggression of Europe. In this situation the position of the United States was clear. The treaties demanded the offer of good offices. Good offices were offered and rejected. The invitation of the foreign powers to the United States was to assist them in support of a policy which would weaken rather than strengthen Asia. This was contrary to American policy.

Japan refused to heed the protest of the United States as well as those of England and Russia. On July 9th, Secretary of State Gresham told the Korean Envoy in Washington that the United States would not intervene forcibly, that the American government would not intervene jointly with the European powers, that it would maintain "impartial neutrality," but that it would seek to influence Japan in a "friendly way."[42] Mr. Gresham expressed to the Japanese Minister in Washington the hope that Japan would deal "kindly and fairly with her feeble neighbor."

To China's request for intervention, Gresham replied advising that China offer the whole question for friendly arbitration. The American Secretary of State did not believe that Japan would resort to war. China, on her part, was not prepared to submit the entire question to arbitration. The fundamental point at issue was the validity of Chinese suzerainty over Korea. Space does not permit a discussion of that claim, but it may be asserted that it would have had a most doubtful status before any board

[41] Foreign Relations, 1894, Vol. 2, p. 30.

[42] *Ibid.*, p. 37.

of arbitration when studied in the light of the various treaties which had been made by Korea beginning with the Japanese treaty in 1876, and also when considered in the light of existing treaties between Japan and China. China had surrendered too much by 1894, and had acquiesced in too much, ever to regain a position of suzerainty over Korea.

On October 6th, the British Chargé approached the American government with a proposition for joint intervention by the United States, Germany, France, Russia and Great Britain on the basis of an indemnity to be paid by China to Japan, and the guarantee by the powers of the independence of Korea.[43] A month later, China formally invoked the good offices of the United States, citing the treaty of 1858, and asking for joint action with the other foreign powers. Before this invitation from Peking was received, the United States directed Dun in Tokio to inquire whether good offices would be acceptable to Japan, and the same day Gresham carefully defined the position of the United States in a note which clearly explained why the United States had been unwilling to join the European powers in intervention, as follows:

> The deplorable war between Japan and China endangers no policy of the United States in Asia. Our attitude towards the belligerents is that of an impartial and friendly neutral, desiring the welfare of both. If the struggle continues without check to Japan's military operations on land and sea, it is not improbable that other powers having interests in that quarter may demand a settlement not favorable to Japan's future security and well-being. Cherishing the most friendly sentiments of regard for Japan, the President directs that you ascertain whether the tender of his good offices in the interests of peace alike honorable to both nations would be acceptable to the Government at Tokio.[44]

In the above friendly warning to Japan, one reads between the lines that Gresham clearly understood the international situation. The proposals which had been made for joint intervention had been by no means disinterested. Every one of them had been directed against Japan with a view to repressing her advancing power and influence in Asia. These proposals had not been, primarily, in the interests of *any* Asiatic state, but in the interests of European political and commercial ambitions in Korea. Dressed in their best clothes, these proposals looked in the direction of a protectorate in Korea; viewed more cynically, and critically, they looked in the direction of dismemberment not merely of Korea, but also further dismemberment of China, and perhaps of Japan.

Japan, however, disregarded the admonitions of the United States, and, instead of pausing at a point where the good offices of the United States might have been valuable in saving Asia in general from a large increase of European influence, over-reached herself by continuing the war so suc-

[43] Foreign Relations, 1894, Vol. 2, p. 70.
[44] *Ibid.*, pp. 73, 74, 76, 77.

cessfully begun. Japan thus invited the very intervention which Gresham had expected.

The subsequent services of the United States in the actual negotiations leading towards peace need not be detailed. From the beginning of the war the United States had stood in a unique relation to both China and Japan since the American legations in Tokio and in Peking, respectively, had taken charge of the Chinese and Japanese archives. The United States became the natural channel of communications between Peking and Tokio, and a peace conference was brought about by the good offices of the United States.[45]

In summary, one may note the following points: (1) The United States fulfilled its treaty obligations both to Korea and to China in the offer of its good offices, and it was by means of the United States that the conflict was terminated. (2) The United States declined to join with other powers in what looked to be an effort to save Korea, but which actually was a plan to repress Japan with a view to the increase of European advantages on the continent of Asia.

The policy of the United States was as follows: First of all to favor peace between the Asiatic states but, if peace were impossible, to favor the growth of Japanese, rather than of European, influence in Asia.[46]

### The Russo-Japanese War and the Annexation of Korea

While the discussion of the Russo-Japanese War and the annexation by Japan does not fall within the limits of this study, and cannot, until more authentic and official documents are available, be studied with precision, so far as they relate to the good offices of the United States promised to Korea under the treaty of 1882, it is not difficult to define the principles and the policy of American action. They may be outlined as follows:

(1) The good offices of the United States could be exercised only with the consent of *both* parties to the dispute. Without such consent the good

[45] Charles Denby, China and Her People, Vol. 2, p. 130 ff.

[46] China seems to have been prepared as early as 1895 to accept arbitration as a method of settling international disputes. It is believed that at Shimoneseki the Chinese Commissioners submitted to Japan for inclusion in the peace treaty an article drafted as follows: "In order to avoid future conflict or war between China and Japan, it is agreed that should any question arise hereafter as to the interpretation, or execution of the present Treaty of Peace, or as to the negotiation, interpretation, or execution of the Treaty of Commerce and Navigation and the Convention of Frontier Intercourse provided for in Article VI of this treaty, which cannot be adjusted by the usual method of diplomatic conference and correspondence between the two governments, they will submit such questions to the decision of an arbitrator to be designated by some friendly power to be selected by mutual accord of the two governments, or, in case of failure to agree as to the selection of said power, then the President of the United States shall be invited to designate the arbitrator; and both governments agree to accept, abide by and carry out in good faith the decision of said arbitrator." The Japanese declined to accept this article.

offices of the United States would become forceful intervention. Such intervention would, in turn, result in the exercise of the powers of a protectorate—a function which was farthest removed from the disposition or the intention of the United States in its relations with Asia. While Korea was, theoretically, not a party to the war between Russia and Japan, the United States, when such a service became acceptable, was glad to extend its good offices to both the combatants and thus to restore such a peace to Asia, as resulted from the Portsmouth Conference.

(2) But the United States was governed by a more fundamental consideration in its attitude towards the Far East. Peace and the independence of Korea were desirable, but even more important was the checking of the growing power of European nations on the western shores of the Pacific. Gresham's policy in 1894 had clearly included this consideration. It is quite evident that Mr. Roosevelt was moved by a similar motive, as was also Great Britain after 1900. The interest of Asia, it was believed, could best be served by the use of the good offices of the United States not only on behalf of an individual state, but also on behalf of eastern Asia as a whole, in the effort to check the advance of Europe. Thus, when it came to the application of this policy at the time of the annexation of Korea, the claims of Korea as an independent state appeared small when compared with the claims of Asia as a whole. The choice, unless an American protectorate were to be established over Korea—a chimerical and quixotic alternative—was between Korea as a source of strength to Japan, or as a part of Russia. With such a choice before it, there could be, if traditional policy were followed, but one answer from the United States.

There is, perhaps, room for speculation as to whether Mr. Gresham, in October, 1894, would not have achieved a greater ultimate good for Korea and for Asia as a whole if he had acceded to the proposition which came from Great Britain to join with the European powers in guaranteeing the independence of Korea. The intervention which the United States declined to support in 1894 is seen, in a somewhat different form, to be necessary in 1922, in the interests of peace in Asia. Yet, one has but to review the relation of the United States to the European powers in the years immediately following Gresham's decision, to realize that such intervention as Great Britain then proposed, could hardly have resulted in good for any party concerned. The United States was not prepared in a naval or military way, or in the condition of public sentiment, to assume such responsibilities as would have been involved. On the other hand, the part played by the United States at the time of the annexation of Korea is certainly not fairly open to the criticisms to which it has been subjected. While seeming to acquiesce in an injustice to a weak nation, the United States actually gave its tacit approval to a step in the direction of justice to Asia as a whole, for in the annexation of Korea to Japan the aggressions of Europe in Asia were curbed.

More recently it has seemed as though this traditional American policy of fostering a strong Asia had defeated its original purpose which was to safeguard American trade in an open field of competition. Japan, having profited as much by American support and assistance in the period before 1900 as she has since by the Anglo-Japanese Alliance, has shown a tendency to over-reach and to defeat the purpose which led the United States to support Asia against Europe. One may hope this is a temporary phase of purely contemporary history. Traditional American policy remains unchanged. The United States desires to see developed on the continent of Asia strong states which shall be able to meet the powers of the world on a footing of the most complete equality and sovereignty, and in the accomplishment of this purpose is as ready to use its good offices today, as it was at any time in the last century.

Indeed, is not the present conference in Washington, in so far as it is concerned with problems of the Pacific, a "good office" to Asia which is quite in accord with the Treaty of Tientsin, of 1858, as well as with traditional American policy?

# AMERICAN DIPLOMACY AND THE FINANCING OF CHINA

By George A. Finch

*Secretary of the Board of Editors*

In his last annual message President Taft thus described the diplomacy of his administration: "The diplomacy of the present administration has sought to respond to modern ideas of commercial intercourse. This policy has been characterized as substituting dollars for bullets. . . It is an effort frankly directed to the increase of American trade upon the axiomatic principle that the Government of the United States shall extend all proper support to every legitimate and beneficial American enterprise abroad."[1]

His official experience in the Philippine Islands had naturally given Mr. Taft a wide knowledge of Oriental affairs and his strong feelings on the subject of American participation in them were indicated in his inaugural address of March 4, 1909 where, as a reason for advising against the reduction of the expenses of the Army and Navy, he said: "In the international controversies that are likely to arise in the Orient growing out of the question of the open door and other issues the United States can maintain her interests intact and can secure respect for her just demands. She will not be able to do so, however, if it is understood that she never intends to back up her assertion of right and her defense of her interest by anything but mere verbal protest and diplomatic note."[2]

Thus holding the belief that the United States would be justified in resorting to force if necessary to keep open the door of equal commercial opportunity for its citizens in China, it was logical for Mr. Taft to justify at the close of his administration as a policy which had "substituted dollars for bullets" the activities of the State Department in behalf of American enterprise in China which had become so intensified as to become popularly characterized as "dollar diplomacy." That diplomacy, it is believed, represents the maximum point to which diplomatic assistance to private investments abroad has been extended by the American Government. It will therefore be taken as a starting point for this outline, which will briefly cover also the diplomacy before that time and of the present time.

The opportunity for the application of Mr. Taft's views occurred soon after he assumed office. In May 1909 the press reported an understanding between English, French and German financial groups for a loan

[1] Congressional Record, Vol. 49, Part I, p. 9.

[2] Congressional Record, Vol. 44, Part I, p. 3.

to China for the proposed Hankow-Szechuen Railway, which later became known as the Hukuang Railway Loan. Secretary of State Knox immediately applied by cable to the Chinese Government for the admission of American capital to participation in the loan,[3] and the State Department requested certain American bankers to take a share in the loan.[4] The diplomatic efforts of the State Department at Peking proved unsuccessful,[5] whereupon President Taft sent a direct communication to Prince Chun, Regent of the Chinese Empire, in which the President stated that he had "an intense personal interest in making the use of American capital in the development of China an instrument for the promotion of the welfare of China, and an increase in her material prosperity without entanglements or creating embarrassments affecting the growth of her independent political power and the preservation of her territorial integrity."[6] The personal interposition of President Taft in the negotiations resulted in the admission of America's equal participation in the loan. To Congress President Taft justified this unique and vigorous exercise of diplomatic pressure upon China in his annual message of December 7, 1909, on the ground that "this railroad loan represented a practical and real application of the open door policy" as well as because of its relation to the currency reform which China undertook in certain treaties of 1903.

In pursuance of the same policy the State Department in 1910 and 1911 assisted in the negotiation of a loan to China with which to inaugurate the new currency system, which, because of the inclusion of Russia and Belgium, became known as the Six Power Loan or Sextuple Consortium. This loan, the President explained, was originally to be solely an American enterprise, but upon the urging of the American Government, the Chinese Government admitted to participation in it the associates of the American group in the Hukuang loan.

At the end of his administration, President Taft thus defended and appraised the foregoing policy in China:

In China the policy of encouraging financial investment to enable that country to help itself has had the result of giving new life and prac-

[3] Foreign Relations of the United States, 1909, p. 144.

[4] "The American group, consisting of J. P. Morgan and Company, Kuhn, Loeb and Company, the First National Bank, and the National City Bank, was formed in the spring of 1909 upon the expressed desire of the Department of State that a financial group be organized to take up the participation to which American capital was entitled in the Hukuang Railway loan agreement then under negotiation by the British, French and German banking groups." (Statement by the American group, March 19, 1913, this JOURNAL, Vol. 7, p. 340.)

[5] The loan had been in course of negotiation for several years and was on the point of being finally concluded when the State Department applied for admission of American capital. The foreign bankers and the Chinese director-general of the railway objected to the delay which would be involved in reopening the negotiations to admit American participation. (Foreign Relations, 1909, pp. 144-178.)

[6] Foreign Relations, 1909, p. 178.

tical application to the open-door policy. The consistent purpose of the present administration has been to encourage the use of American capital in the development of China by the promotion of those essential reforms to which China is pledged by treaties with the United States and other powers. The hypothecation to foreign bankers in connection with certain industrial enterprises, such as the Hukuang railways, of the national revenues upon which these reforms depended, led the Department of State early in the administration to demand for American citizens participation in such enterprises, in order that the United States might have equal rights and an equal voice in all questions pertaining to the disposition of the public revenues concerned. The same policy of promoting international accord among the powers having similar treaty rights as ourselves in the matters of reform, which could not be put into practical effect without the common consent of all, was likewise adopted in the case of the loan desired by China for the reform of its currency. The principle of international cooperation in matters of common interest upon which our policy had already been based in all of the above instances has admittedly been a great factor in that concert of the powers which has been so happily conspicuous during the perilous period of transition through which the great Chinese nation has been passing.[7]

It will be well at this point to go back and consider what had been the attitude of the American Government towards assisting and protecting American investors in China previous to the so-called "dollar diplomacy." In an instruction to Mr. Denby on December 19, 1896, Secretary of State Olney stated, "You should not assume directly or impliedly in the name of this government any responsibility for, or guaranty of, any American commercial or industrial enterprise trying to establish itself in China," but that Mr. Denby should use his "personal and official influence and lend all proper countenance to secure to reputable representatives of such concerns the same facilities for submitting proposals, tendering bids, or obtaining contracts as are enjoyed by any other foreign commercial enterprise in the country. . . . Broadly speaking, you should employ all proper methods for the extension of American commercial interests in China, while refraining from advocating the projects of any one firm to the exclusion of others."[8]

A case in point was presented to the Department of State in August 1898. On the 19th of that month a copy of a contract between the Chinese Minister at Washington, acting on behalf of his Government, and the American-China Development Company was sent to the Department with the request that the Department give notice to the United States legation and consulates in China that the representatives of the company charged with carrying out the provisions of the contract "shall have recognition and protection in the performance of their duties" and that the charge of the revenues and property assigned to the loan under contract "will be

[7] Annual message, Dec. 3, 1912, Congressional Record, Vol. 49, Part I, p. 9.
[8] Foreign Relations, 1897, p. 56.

noted by this government, which will uphold the contract as a binding engagement upon the Imperial Chinese Government." In his reply of August 24, 1898, Secretary of State Day informed the company "that the Department is unable to give you such a letter as you request. While the Government of the United States is always ready to enforce the just rights of its citizens abroad, it has always declined to become the guarantors of their contracts with foreign governments. As a rule, it has declined, where such a contract was alleged to have been violated by the foreign government, to interfere beyond the exercise of good offices. This being so, still less can it assume beforehand to guarantee the execution of the contract." In its application the company had stated that the English investors will have "the usual recognition" from the British Foreign Office substantially in the form requested by the company from the Department of State. In answer to this statement, Mr. Day said: "The British Crown, which exercises the executive power in that country, possesses both the war-making power and the treaty-making power, and is therefore authorized, in matters involving relations with foreign countries, to give guarantees and to enter into engagements which the executive of the United States would not alone be competent to assume."[9]

On October 21, 1905, the Department instructed the Legation at Peking that it might forward without comment to the Chinese Foreign Office the applications of reputable American citizens for privileges and concessions.[10]

The actions of the Department in the period from 1909 to 1912 went far beyond, and indeed contravened the foregoing expressions of previous policy. The official representations made by Secretary of State Knox and the personal appeal of President Taft made the Government of the United States virtually a party to the application for the Hukuang Railway Loan. The initiative of the State Department in the formation of the American group to participate in the loan made the Government practically a sponsor for the actions of that group in China. Although nothing is directly contained in the published correspondence regarding the amount and kind of protection which the Department was to give to the American investors in case of a default on the part of China, the implication is unavoidable that the maximum amount of protection of which the executive was capable would be extended in the case of both the Hukuang Railway Loan and the Currency Reform Loan. Any other inference would not be fair to President Taft and Secretary Knox who were officially responsible for American participation in both transactions. Such a guarantee of the execution of a contract was expressly refused, as above pointed

[9] Moore, International Law Digest, Vol. VI, p. 288.

[10] See despatch of July 11, 1913, from Mr. Williams, Chargé at Peking, printed in Foreign Relations, 1913, p. 186.

out, by Secretary of State Day in his reply to the American-China Development Company in 1898. He was unwilling to assure protection beyond the exercise of good offices. Citing a long list of Secretaries of State from Secretary Forsyth in 1834 to Secretary Hay in 1899, Dr. John Bassett Moore states: "It is not usual for the Government of the United States to interfere, except by its good offices, for the prosecution of claims founded on contracts with foreign governments."[11] Lack of authority on the part of the Executive was given by Secretary of State Marcy as the reason for the rule in an instruction to the American Minister to Peru on May 24, 1855. He said: "It does not comport with the dignity of any Government to make a demand upon another which might not ultimately, on its face, warrant a resort to force for the purpose of compelling a compliance with it. Such a course can not, under this Government, be adopted without authority from Congress, and it is almost impossible to imagine any contract or any circumstances attending the infraction of one by a foreign government which would induce Congress to confer such an authority upon the President."[12] Other reasons in justification of the rule were given by Mr. Taft's predecessor in office. President Roosevelt, in a message to the Senate, February 15, 1905, made the following statement:

> Except for arbitrary wrong, done or sanctioned by superior authority, to persons or to vested property rights, the United States Government, following its traditional usage in such cases, aims to go no further than the mere use of its good offices, a measure which frequently proves ineffective. On the other hand, there are governments which do sometimes take energetic action for the protection of their subjects in the enforcement of merely contractual claims, and thereupon American concessionaires, supported by powerful influences, make loud appeal to the United States Government in similar cases for similar action. They complain that in the actual posture of affairs their valuable properties are practically confiscated, that American enterprise is paralyzed, and that unless they are fully protected, even by enforcement of their merely contractual rights, it means the abandonment to the subjects of other governments of the interests of American trade and commerce through the sacrifice of their investments. . . . Thus the attempted solution of the complex problem by the ordinary methods of diplomacy reacts injuriously upon the United States Government itself, and in a measure paralyzes the action of the Executive in the direction of a sound and consistent policy.[13]

It is evident, however, that the Hukuang Railway Loan and the Currency Reform Loan to China were not regarded as ordinary contracts between private American citizens and a foreign government. President Taft regarded the group of American bankers as "the indispensable instrumentality" for carrying out a broad policy of great national interest,[14]

[11] Moore, International Law Digest, Vol. VI, p. 705.
[12] Moore, International Law Digest, Vol. VI, p. 709.
[13] Moore, International Law Digest, Vol. VI, p. 289.
[14] Annual message, Dec. 7, 1909, Congressional Record, Vol. 45, Part I, p. 28.

and throughout his official utterances on the subject he stressed the political importance of these loans in China. This phase of the transactions was also duly appreciated by America's European partners and unfortunately the political aspects became the chief object of the negotiations between the interested governments. After an unedifying exchange of diplomatic correspondence, the Hukuang railway was divided into sections between officials and markets of the nationalities of the respective lenders for construction purposes and the furnishing of materials. The Currency Reform Loan negotiations developed into a sharp diplomatic struggle over the appointment by the lending powers on the basis of nationality of inspectors in the salt gabelle, advisers in the Bureau of Audits and a Director of Foreign Loans, after they had vetoed the Chinese appointment of "neutral" officials to these positions on the basis of ability irrespective of nationality. Telegraphing on this subject to the Department of State on February 21, 1913, Minister Calhoun said: "To my mind it is no longer a question of friendly international cooperation to help China but a combination of big powers with common interests to accomplish their own selfish political aims." Secretary of State Knox replied on February 27, 1913, deprecating the introduction of political issues into the loan negotiations. "Experience has shown," he said, "the wisdom of surrounding such loans to China with adequate safeguards of supervision, not only as a reasonable measure of protection for the interests of the lenders and of the ultimate bondholders but also as a necessary means of upholding China's credit and avoiding the possible consequences of default in her financial obligations, which are already pressing. The Department has, however, consistently held that the Chinese Government must be left free to accept or decline a loan on the conditions proposed, and the American group of bankers interested in the loan negotiations have likewise held the same views."[15]

Such was the status of the negotiations when President Wilson assumed office on March 4, 1913. Under the working of the American political system, all national policies, including foreign policy, are dependent upon the views of the administration for the time being in power, and the American group very naturally desired to know whether the new administration would continue to regard them as an indispensable instrumentality of governmental policy in the Far East or whether they would be relegated to the non-preferred position of ordinary private citizens holding a contract with a foreign government. The fact that their contract had been negotiated at the suggestion of the government and through its diplomatic support could not raise it to the solemnity and legal effect of a treaty binding upon the government regardless of the administration in power, as in the case of the loan to Santo Domingo under the Receivership Convention with the United States Government.

[15] Foreign Relations, 1913, pp. 164, 166.

Therefore, on the day following the inauguration of President Wilson, the American group addressed a letter to the Secretary of State, referring to the Chinese loan negotiations "upon which this group entered originally at the request of the Department of State, and in which we have continued with its approval and under its direction," and respectfully requested that the Department let the group know its wishes as to the future conduct of the negotiations. On March 18, 1913, President Wilson issued to the press "a declaration of the policy of the United States with regard to China," in which, after reciting that the American bankers "declared that they would continue to seek their share of the loan under the proposed agreements only if expressly requested to do so by the government," he stated that "the administration has declined to make such request, because it did not approve the conditions of the loan or the implications of responsibility on its own part which it was plainly told would be involved in the request." President Wilson's statement continued:

> The conditions of the loan seem to us to touch very nearly the administrative independence of China itself; and this administration does not feel that it ought, even by implication, to be a party to those conditions. The responsibility on its part which would be implied in requesting the bankers to undertake the loan might conceivably go to the length in some unhappy contingency of forcible interference in the financial, and even the political, affairs of that great oriental state, just now awakening to a consciousness of its power and of its obligations to its people. The conditions include not only the pledging of particular taxes, some of them antiquated and burdensome, to secure the loan, but also the administration of those taxes by foreign agents. The responsibility on the part of our government implied in the encouragement of a loan thus secured and administered is plain enough and is obnoxious to the principles upon which the government of our people rests.

President Wilson's statement was immediately communicated to the interested governments and the American group promptly announced its withdrawal from the loan.[16] Thus through the action of President Taft's administration in urging China to admit the European bankers to the Currency Reform Loan which China had sought to place solely in the United States, and of President Wilson, in withdrawing American support after the loan had been negotiated with the Sextuple Consortium, China was thrown upon the very lenders whom she had sought to avoid and was being pressed with conditions of a foreign loan which the *Peking Daily News* of March 25, 1913 stated China would never accept unless under compulsion.[17] A few days after the publication of President Wilson's statement, namely, March 25, 1913, the Chinese Minister called at the State Department and

[16] The complete statement of President Wilson, together with the statement of the bankers announcing their withdrawal from the loan, is printed in an editorial in this JOURNAL, Vol. 7, 1913, pp. 335-341.

[17] Foreign Relations, 1913, p. 175*n*.

informed the Acting Secretary of State that he "had received special instructions from President Yuan Shih Kai to make formal expression of the thanks of the people of China and of their appreciation of the just and magnanimous attitude of President Wilson indicated in the public statement recently issued by him which was accepted by the Chinese Government as an expression of sincere friendship toward the Republic and people of China."[18]

A few months later Mr. E. T. Williams, the American Chargé d'Affaires at Peking, in a despatch dated July 11, 1913, requested instructions as to the attitude to be taken by the Legation towards financial transactions between American capitalists and the Chinese Government. He stated that he had several times recently been approached by prominent Chinese officials and others with inquiries for American financiers who might be willing to make loans to the Chinese Government for industrial or administrative purposes, and that in discussing these problems with American business men he had been asked whether the American Government would give its support to these enterprises. Mr. Williams explained that many industrial enterprises in China are either wholly or partially owned by the government and that nearly all railway construction is carried or under contracts with the government. Participation in such enterprises, Mr. Williams said, concerns also the future of American trade "because concessions obtained now will secure for the nations obtaining them the Chinese market for the machinery and other supplies needed in the development of the concessions. Once supplies of a certain type are introduced they tend to become standard and the sale of other sorts becomes very difficult." The central and provincial governments are often in need of money for administrative purposes which can only be obtained by loans secured upon the national or local taxes. "It is evident," Mr. Williams stated, "that financial transactions between American citizens and the Chinese Government are altogether different from such transactions between individuals or business firms. When difficulties occur in connection with the latter, suits may be brought by American plaintiffs in Chinese courts in which our consular representatives have a right to sit as associates to see that justice is done and the treaty rights of their nationals protected; and in cases where Americans are defendants the American consular courts or the United States Court for China have jurisdiction. Should the Chinese Government, however, default in its engagements with

[18] For this and other documents relating to the withdrawal of the American group from the loan, see Foreign Relations, 1913, pp. 167 *et seq.* For an official Chinese criticism of the terms of this loan, see translation of the letter of the Chinese Minister of Finance to the Sextuple Group, dated March 11, 1913, p. 169; see especially also the despatch of Mr. Williams, American Chargé at Peking, Oct. 21, 1913, regarding the reluctance of China to place a further loan with the quintuple group and her desire to place such a loan with American capitalists, p. 189.

American financiers, it might become necessary to take possession of the revenues pledged as security for the loans made and this, as the President points out, might require 'forcible interference in the financial and even the political affairs of China.' "[19]

In response to Mr. William's request for instructions, Secretary of State Bryan replied on September 11, 1913, that the Department "is extremely interested in promoting, in every proper way, the legitimate enterprises of American citizens in China and in developing to the fullest extent the commercial relations between the two countries." "This Government," he said, "expects that American enterprise should have opportunity everywhere abroad to compete for contractual favors on the same footing as any foreign competitors;" but, he added, "this Government is not the endorser of the American competitor, and is not an accountable party to the undertaking. . . . If wrong be done toward an American citizen in his business relations with a foreign government, this government stands ready to use all proper effort toward securing just treatment for its citizens. This rule applies as well to financial contracts as to industrial engagements." The Secretary reaffirmed the Department's instructions of October 21, 1905, above referred to, and referred the legation to Mr. Olney's instructions of December 19, 1896, above quoted, as a clear statement of the general principle which the Department considered still generally applicable.

Although the President of China thanked President Wilson for withdrawing his support from the Six-Power Loan, this was not an indication that the Chinese Government did not desire the investment of American capital. "The withdrawal of the United States left China without a disinterested friend to help her in her dealings with other powers," says M. Joshua Bau, a recent Chinese writer. "With the absence of the United States there was no moral leader among the Powers who could uphold the doctrine of equal opportunity of trade and the integrity of China. As a result, the other Powers fell into their old practice of international struggle for concessions."[20]

On October 21, 1913, the American Chargé reported that he had been approached by the Premier and three other cabinet ministers on the sub-

[19] Foreign Relations, 1913, p. 183.

There is another element in the foreign loan situation in China which, though disagreeable to mention, has to be taken into consideration. In a despatch of Sept. 25, 1913, the American Chargé at Peking referred to the extravagance and corruption of the government. "The opinion generally expressed by foreigners in Peking," he said, "is that there is far more corruption under the Republic than under the Manchu régime. There are many more officials to be satisfied now, and the commissions upon contracts that are approved are necessarily much larger. In one instance it is credibly stated to have been thirty-five per cent." (Foreign Relations, 1913, p. 188.)

[20] The Foreign Relations of China, by M. Joshua Bau, pp. 67 and 171. (Revell Co., New York.)

ject of a loan by American capitalists to the Chinese Central Government. "The Premier regretted," he said, "that the American bankers had withdrawn from participation in the currency loan, that the currency of the country was in a very bad condition, and that its reform was urgently needed. He said the Chinese Government would be glad if the American Government would give such assurances to American capitalists as would induce them to resume the lending of money to China." The American Chargé expressed the opinion that "undoubtedly, the Chinese would like competition between American financiers and those of the quintuple group, since the latter might in such case be induced to moderate their demands."[21]

No official notice, however, appears to have been given to these appeals, and in 1916, when a Chicago banking house advanced to China $5,000,000 for administrative purposes and sent a copy of the contract to the State Department for a statement of its policy respecting such loans, Mr. Lansing simply replied "that the Department of State is always gratified to see the Republic of China receive financial assistance from the citizens of the United States, and that it is the policy of the Department, now as in the past, to give all proper diplomatic support and protection to the legitimate enterprises abroad of American citizens."[22]

The entry of the United States into the war, however, produced a radical change in the attitude of the State Department upon the subject. Feeling that proper means should be placed at the disposal of China to equip herself so as to be of more assistance in the war, says a statement issued by the Department on July 30, 1918, "a number of American bankers, who had been interested in the past in making loans to China and who had had experience in the Orient, were called to Washington and asked to become interested in the matter. The bankers responded very promptly and an agreement has been reached between them and the Department of State which has the following salient features:

"First, the formation of a group of American bankers to make a loan or loans and to consist of representatives from different parts of the country.

"Second, an assurance on the part of the bankers that they will cooperate with the Government and follow the policies outlined by the Department of State.

"Third, submission of the names of the banks who will compose the group for approval by the Department of State.

"Fourth, submission of the terms and conditions of any loan or loans for approval by the Department of State.

"Fifth, assurances that, if the terms and conditions of the loan are accepted by this Government and by the Government to which the loan is made, in order to encourage and facilitate the free intercourse between

[21] Foreign Relations, 1913, p. 191.

[22] New York *Times*, Nov. 17, 1916.

American citizens and foreign States which is mutually advantageous, the Government will be willing to aid in every way possible and to make prompt and vigorous representations and to take every possible step to insure the execution of equitable contracts made in good faith by its citizens in foreign lands."

The Department stated that negotiations were in progress with the governments of Great Britain, Japan and France to secure their co-operation and the participation by bankers of their countries in equal parts in any loan which may be made.[23]

In the correspondence, which has now been published, leading up to the agreement between the State Department and the bankers,[24] it appears that the latter informed Secretary Lansing that it would be necessary "if now and after the war we are successfully to carry out the responsibilities imposed upon us by our new international position, that our Government should be prepared in principle to recognize the change in our international relations, both diplomatic and commercial, brought about by the war," and they expressed the conviction that no Chinese loan could be placed in this country "unless the Government would be willing at the time of issue to make it clear to the public that the loan is made at the suggestion of the Government." Mr. Lansing replied, on July 9, 1918, that "with the consequent expansion of our interests abroad there must be considered also the element of risk which sometimes enters into the making of loans to foreign governments and which is always inseparable from investments in foreign countries where reliance must be placed on the borrowers' good faith and ability to carry out the terms of the contract. This Government realizes fully that condition." In the same letter, however, Mr. Lansing said that "this Government would be opposed to any terms or conditions of a loan which sought to impair the political control of China or lessened the sovereign rights of that Republic." Later, in response to a specific request of the British Foreign Office as to the meaning of this statement, Mr. Lansing explained, in a memorandum of October 8, 1918, that it "had reference only to the future activities of the American group" and "that the United States Government did not mean to imply that foreign control of the collection of revenues or other specific security by mutual consent would necessarily be objectionable, nor would the appointment under the terms of some specific loan of a foreign adviser."

[23] New York *Times*, July 30, 1918, p. 13.

[24] The documents were made public by the State Departemnt on March 30, last, but their bulkiness forbade their textual reprinting. They have now been issued by the Carnegie Endowment for International Peace in a pamphlet of 78 printed pages, in an information series published upon questions relating to the Conference on the Limitation of Armament and Problems of the Pacific. Pamphlet No. 40, Division of International Law.

The proposals of Secretary Lansing for the formation of the consortium met with the approval of the British, French and Japanese Governments, and the negotiation by the international bankers of the terms of the consortium took place at Paris coincident with the meeting of the Peace Conference. A draft agreement was drawn up on May 12, 1919 and submitted for the approval of the respective governments. Two obstacles arose, however, which prevented the prompt approval of the draft bankers' agreement.

The first obstacle related to the measure of diplomatic support to be accorded to the banking groups by their respective governments. The draft agreement recited that the groups "are entitled to the exclusive diplomatic support of their respective governments." In Mr. Lansing's memorandum of October 8, 1918, outlining his plan to the other governments, he stated that it was intended to include in the membership of the national groups all financial firms of good standing interested in administrative and industrial loans to China and that the interested governments should withhold their support from independent financial operations without previous governmental agreement. Mr. Lansing stated that thirty-one banks representative of all sections of the country had joined the American group. The British Foreign Office, in its note of March 17, 1919, accepted this proposal and offered exclusive support to the British group on condition that it was enlarged in such a manner as to render it sufficiently representative of the financial houses of good standing interested in Chinese loans to prevent criticism on the ground of exclusiveness.

On June 7, 1919, however, the British Government informed the State Department that it could not extend its exclusive support to the British group "as the latter have hitherto failed to comply with the conditions on which alone His Majesty's Government are prepared to guarantee exclusive official support."[25]

The French Government also expressed its inability to extend exclusive support to the French Group. Its reasons may best be expressed by quoting from the note of the French Foreign Office to the American Ambassador at Paris, dated June 20, 1919, as follows:

> You are no doubt aware that both in France and England the groups whilst admitting new members have for various reasons excluded firms with important interests in China. New enterprises may, moreover, at

[25] In a letter of June 4, 1919, the Hongkong and Shanghai Banking Corporation, when informing the Foreign Office that they considered the British group as at present constituted fully representative of British finance, stated that "they are well content with the general measure of government support which they at present enjoy and have no desire to change it for any other. Their sole object in assenting to the conditions attached to exclusive support was to further the policy of His Majesty's Government with regard to the American consortium proposal, of which exclusive support was a postulate." For the full correspondence between the British group and the Foreign Office, see Miscellaneous, No. 9, pp. 12-36.

any time spring up desirous of carrying on business in China, but not disposed to enter the consortium just as the consortium may possibly not be disposed to admit them. Now, there is nothing in French law which permits the limitation of the individual activity of private persons nor that of financial and industrial companies, nothing which permits the restriction of their activities in China or in any other part of the world. It follows that the consortium, not having united and being indeed practically speaking unable to unite all the French interests which operate or which may some day desire to operate in the territory of the Chinese Republic, could not claim the exclusive support of the French Government. The principles of our public law as well as parliamentary opinion would not allow us to grant it a sort of monopoly. Besides, you are aware that at the time of the formation of the old consortium it was not accorded any privilege in law or in fact, and its founders simply relied on the financial strength of the organization, the resources of the participating concerns and the co-ordination of their efforts to obtain for themselves the preponderating position in the Chinese market, which they have not ceased to enjoy. It is on these intrinsic elements of success, rather than on legal privileges, that the new consortium should base its prospects.[26]

The American State Department seems to have held itself competent and to have been willing to guarantee exclusive support to the American group, but in order to obtain the approval of France and Great Britain it proposed and they accepted the following formula in lieu of the provision objected to:

The Governments of each of the four participating groups undertake to give their complete support to their respective national groups members of the Consortium in all operations undertaken pursuant to the resolutions and agreements of the 11th and 12th of May, 1919, respectively, entered into by the Bankers at Paris. In the event of competition in the obtaining of any specific loan contract the collective support of the diplomatic representatives in Peking of the four Governments will be assured to the Consortium for the purpose of obtaining such contract.

A more serious obstacle to the approval of the draft agreement arose from the attempt of Japan to exclude certain parts of Manchuria and Mongolia from the operation of the consortium. Such exclusion was proposed at Paris on June 18, 1919 by the representative of the Japanese group and was confirmed by the Japanese Embassy at Washington on August 27, 1919, which offered to accept the draft agreement of May 12, 1919 with the following proviso: "Provided, however, that the acceptance and confirmation of the said resolution shall not be held or construed to operate to the prejudice of the special rights and interests possessed by Japan in South Manchuria and Eastern Inner Mongolia."

The attempt to exclude these regions was immediately protested by the American State Department and the British Foreign Office. Secretary Lansing, in a memorandum of October 28, 1919, stated that the

[26] Miscellaneous No. 9, 1921, pp. 27-28.

American Government "can only regard the reservation in the form proposed as an intermixture of exclusive political pretensions in a project which all the other interested Governments and groups have treated in a liberal and self-denying spirit and with the purpose of eliminating so far as possible such disturbing and complicating political motives; and it considers that from the viewpoint either of the legitimate national feeling of China or of the interests of the Powers in China it would be a calamity if the adoption of the Consortium were to carry with it the recognition of a doctrine of spheres of interest more advanced and far-reaching than was ever applied to Chinese territory even when the break-up of the Empire appeared imminent." Mr. Lansing pointed out that the inter-group agreement of May 12 specified that only those industrial undertakings are to be pooled upon which substantial progress has not been made and that "if Japan's reservation is urged with a view solely to the protection of existing rights and interests, it would seem that all legitimate interests would be conserved if only it were made indisputably clear that there is no intention on the part of the Consortium to encroach on established industrial enterprises."

The Japanese Government replied on March 2, 1920 denying that its proposal was prompted by a "desire of making any territorial demarcation involving the idea of economic monopoly or of asserting any exclusive political pretentions or of affirming a doctrine of any far-reaching sphere of interest in disregard of the legitimate national aspirations of China, as well as of the interests possessed there by the Powers concerned," but asserting that "the regions of South Manchuria and Eastern Inner Mongolia which are contiguous to Korea stand in very close and special relation to Japan's national defense and her economic existence," that "enterprises launched forth in these regions often involve questions vital to the safety of the country," and that these circumstances "compelled the Japanese Government to make a special and legitimate reservation indispensable to the existence of the State and its people." The Japanese memorandum then proposed a new formula of acceptance of the consortium which stated that "in matters relating to loans affecting South Manchuria and Eastern Inner Mongolia which in their opinion are calculated to create a serious impediment to the security of the economic life and national defense of Japan, the Japanese Government reserve the right to take the necessary steps to guarantee such security," and appended a list of Japanese undertakings and options to be excluded from the activities of the Consortium. An identical memorandum was presented to the British Foreign Office on March 16, 1920. Since the replies to these memoranda have been accepted by Japan as an integral part of its acceptance of the consortium, the relevant portions of the American reply on March 16, 1920 is quoted textually. After stating that the right of national self-preserva-

tion is one of universal acceptance which does not require specific formulation and "that the recognition of that principle is implicit in the terms of the notes exchanged between Secretary Lansing and Viscount Ishii on November 2, 1917," the American memorandum states:

This Government therefore considers that by reason of the particular relationships of understanding thus existing between the United States and Japan, and those which, it is understood, similarly exist between Japan and the other Powers proposed to be associated with it in the Consortium, there would appear to be no occasion to apprehend on the part of the Consortium any activities directed against the economic life or national defense of Japan. It is therefore felt that Japan could with entire assurance rely upon the good faith of the United States and of the other two Powers associated in the Consortium to refuse their countenance to any operation inimical to the vital interests of Japan.

Similar assurances were given by Great Britain on March 19, 1920, and by France on May 25, 1920.

With reference to the specific undertakings in Manchuria and Mongolia which Japan proposed to exclude from the operations of the consortium, both the United States and Great Britain filed objections and proposed that this question be settled in negotiations between representatives of the American and Japanese banking groups.

In memoranda dated April 3 and May 8, 1920, to the Department of State, and April 14 and May 10, 1920, to the British Foreign Office, Japan, after stating that she put forward her proposal "in order to make clear the particular position which Japan occupies through the facts of territorial propinquity and of her special vested rights," accepted the foregoing assurances in lieu of her formula, and authorized the Japanese banking group to enter the consortium on the same terms as the other groups and to settle with those groups the concrete questions as to which of the options Japan possesses in Manchuria and Mongolia were to be excluded from the consortium. The negotiations between the two groups were concluded at Tokio on May 11, 1920 and resulted in the following agreement:

1. That the South Manchurian Railway and its present branches, together with the mines which are subsidiary to the railway, do not come within the scope of the Consortium;
2. That the projected Taonanfu-Jehol Railway and the projected railway connecting a point on the Taonanfu-Jehol Railway with a seaport are to be included within the terms of the Consortium Agreement;
3. That the Kirin-Huining, the Chengchiatun-Taonanfu, the Changchun-Taonanfu, the Kaiyuan-Kirin (via Hailung), the Kirin-Changchun, the Sinminfu-Moukden and the Ssupingkai-Chengchiatun Railways are outside the scope of the joint activities of the Consortium.

So far as the published correspondence discloses, the first communication to the Chinese Government regarding the consortium was made on September 28, 1920, in a joint note of the American, British, French

and Japanese Legations at Peking, setting forth its scope and object. China was told that "in the course of 1918 the United States Government informed the other three governments in question of the formation in the United States of America of an American group of bankers for the purpose of rendering financial assistance to China;" that "the principles underlying the formation of the American group were that all preferences and options for loans to China held by any members of this group should be shared by the American group as a whole and that future loans to China having a governmental guarantee should be conducted in common as group business, whether these loans were for administrative or for industrial purposes;" and that the financial groups of the four Powers had agreed upon a draft arrangement embodying *inter alia* the principles of the American proposals, which arrangement "relates to existing and future loan agreements involving the issue for subscription by the public of loans having a Chinese Government guarantee subject to the proviso that existing agreements for industrial undertakings upon which substantial progress has been made may be omitted from the scope of the arrangement." The measure of support to be given by the respective Governments to their national groups or to the consortium as a whole was stated in substantially the same language as that hereinbefore given, and China was informed that while the new arrangement was not intended to interfere with any of the rights of the old consortium, the proposals envisaged a reconstruction and enlargement of it "so as to meet the larger needs and opportunities of China in a spirit of harmony and of helpfulness rather than of harmful competition and self-interest."

The final text of the consortium agreement was signed at New York on October 15, 1920 and transmitted to the Chinese Government on January 13, 1921. A Belgian banking group was admitted to membership after signature of the agreement. The text of the agreement is printed in the Supplement.[27]

The new consortium differs from the old in one important particular, namely, in that it does not relate to a specific loan but applies with certain exceptions to public loans held or to be obtained by the members. In all operations undertaken pursuant to the consortium the respective governments pledge their "complete support." The meaning of the term quoted is not defined. It is evidently more than the "good offices" which every government is ordinarily prepared to extend to any of its citizens in contract claims.[28] The expression doubtless must mean that the gov-

[27] P. 4.

[28] "Good offices" consist merely in a direction to the diplomatic agent "to investigate the subject, and if you shall find the facts to be as represented, you will secure an interview with the Minister for Foreign Affairs and request such explanations as it may be in his power to afford." (Moore, International Law Digest, Vol. VI, p. 710.)

ernments will be prepared to make official diplomatic representations. In this respect the promise of the American State Department goes beyond the traditional practice of the Department prior to Mr. Taft's administration. It will be noted that the support pledged is not limited to *diplomatic* support. It may mean, therefore, complete support of any kind necessary to protect the operations of the consortium. Such an interpretation would, of course, include military support. That an American Secretary of State is competent to commit the Government to such an undertaking in behalf of private contracts has been denied by Secretaries Marcy and Day, as above set forth.

There apparently is no intention of official participation in the securing of loans for the consortium; but in the event of competition the governments will lend the support of their diplomatic representatives. To this extent, the action of the State Department under the new consortium will be comparable to the diplomatic support exerted by Mr. Taft's administration to secure American participation in the Hukuang Railway Loan.

To the appointment of foreign officials in China for purposes of supervision, which became such an objectionable feature under the old consortium as to lead to American withdrawal, the concurrence of the State Department has been given in advance in the correspondence and diplomatic notes of Mr. Lansing leading up to the formation of the new consortium. A measure of control to prevent the abuse of this dangerous expedient is retained by the requirement in the agreement with the bankers that they will follow the policies outlined by the Department of State and submit the terms and conditions of each loan for the approval of the Department. It will be recalled that the negotiations of the American group in the old consortium were carried on with the approval and under the direction of the Department of State, but the department, representing only one of a partnership of six, found itself entangled in embarrassing political negotiations from which it was only extricated by an inglorious withdrawal from the whole transaction.

A few months after the new consortium was formed another change of administration took place in Washington, and on March 10, 1921, the representatives of the American group addressed a letter to the new Secretary of State, inquiring if the policy of the Department in encouraging American interests in the assistance of China through the operations of the international consortium was in accord with his views and received his approval. The letter stated that the operations of the consortium are in no way designed to interfere with the private initiative of Americans or other nationals in China, that it does not propose to undertake any mercantile, industrial or banking projects, but plans only to help China in the establishment of her great public utilities, such as the build-

ing of her railways, canals, etc., thereby assisting in stabilizing China economically and financially, and making that field a safer one for the initiative of our citizens in private enterprises in commerce, industry, etc.

In reply, Secretary Hughes, on March 23, 1921, informed the American group "that the principle of this cooperative effort for the assistance of China has the approval of this Government, which is hopeful that the Consortium constituted for this purpose will be effective in assisting the Chinese people in their efforts towards a greater unity and stability, and in affording to individual enterprises of all nationalities equality of commercial and industrial opportunity and a wider field of activity in the economic development of China."

# THE PROTECTION OF AMERICAN CITIZENS IN CHINA: EXTRATERRITORIALITY

By Benj. H. Williams

## THE ORIGIN OF EXTRATERRITORIALITY IN CHINA

The most important single step taken by the western powers in protecting their nationals in China was the acquisition of extraterritoriality. This withdrew them from the jurisdiction of Chinese law and placed them under the laws and tribunals of the home country. As there is at the present time a great deal of discussion as to whether these rights should be withdrawn it may be worth while to glance for a moment at the reasons for the origin of the system, and this may in turn enable us to judge better whether the conditions which gave rise to it have as yet passed away.

Prior to the intercourse of western nations with China the system of extraterritoriality had existed in certain other oriental countries, dating back to the exemptions allowed under the Greek Emperors at Constantinople.[1] But when the western nations came in contact with China they found there no willingness to allow immunities from the Chinese law. China had gone through a period of legal evolution similar in this respect to that of the European nations but earlier in date. The Chinese law, like that of the West, had become territorial, and all within the Emperor's domain were subject to his jurisdiction. The Chinese Penal Code provided: "In general, all foreigners who come to submit themselves to the government of the Empire, shall, when guilty of offenses, be tried and sentenced according to the established laws."[2]

It is true that in the case of the Russian relations along the northern border it was provided by treaty as early as 1689 that where the subjects of one country should commit offenses in the other they should be taken across the border for punishment. At Canton, however, where the greater part of the trade with the West was carried on, the strict territoriality of the law prevailed. During the early period the Chinese took jurisdiction

[1] See Frank E. Hinckley, American Consular Jurisdiction in the Orient, Washington, D. C., 1906; Philip Marshall Brown, Foreigners in Turkey, Princeton, N. J., 1914.

[2] Sir George Thomas Staunton, Penal Code of China (a translation), London, 1810, Sec. XXXIV, p. 36.

over all criminal cases, including those where Europeans were concerned.[3]

The Terranova case illustrates the methods used by the Chinese in compelling the surrender of an accused foreigner. During September, 1821, while the American ship *Emily* was at Canton, a member of the crew, Francis Terranova, an Italian by birth, was accused of causing the death of a Chinese woman. She was selling fruit in a small boat alongside the *Emily;* and the sailor, whether by accident or design, dropped an earthen jar overboard, striking her upon the head and causing her to fall into the water and drown. The Chinese authorities immediately demanded that Terranova be surrendered to them. The captain of the *Emily* refused to deliver him, but instead placed him in confinement on the boat. After negotiations it was agreed that he should have a fair and impartial trial by a Chinese magistrate on board of the *Emily.* The trial was accordingly held, but compared with American standards of justice it was exceedingly unfair to the accused. The defendant was adjudged guilty and request was made that he be sent ashore for execution. During the negotiations which followed this demand the Americans are reported to have said: "We are bound to submit to your laws while we are in your waters, be they ever so unjust. We will not resist them."[4]

The Americans refused to surrender the prisoner, stating however that they would make no resistance should the Chinese come aboard and take him. Upon receiving this answer the local authorities arrested the security merchant and linguist of the *Emily* and placed them in close confinement in Canton. The American trade was ordered to be stopped, and the merchants were forbidden to supply the ship with provisions. After a week, during which time the American traders experienced great inconvenience, Terranova was surrendered. A second trial was held at Canton at which no foreigners were allowed to be present. The accused was found guilty and strangled to death within twenty-four hours at the public execution grounds in Canton. His body was then returned to the *Emily.* From this it may be seen that the Chinese claimed jurisdiction over foreigners within their territory and used vigorous methods to enforce their claims.

### OBJECTIONS OF FOREIGNERS TO THE CHINESE JURISDICTION

Submission to Chinese jurisdiction was, however, revolting to foreigners on account of certain obnoxious features of the Chinese law and procedure, which may be described as follows:

[3]Staunton, *supra.*, p. 517, setting forth an edict demanding the surrender of an accused European at Macao. See also Peter Auber, China, an Outline, London, 1834, p. 85; Hosea Ballou Morse, The International Relations of the Chinese Empire, London, 1910, Vol. 1, p. 100.

[4]North American Review, Vol. 40, p. 66, giving the account of an eye-witness to the trial.

### *Severity and Cruelty of Punishments*

According to the Penal Code there were several gradations of punishments varying with the seriousness of the crime. These, in brief, consisted of death by slicing, decapitation and strangulation; transportation for life or a term of years, often combined with penal servitude; whipping with the bamboo; and wearing the cangue, or a square wooden frame around the neck. This was a system of severe penalties and humiliations without any idea of reformation except through fear and force. There is evidence that the actual administration of the law was by no means as severe as the written code would indicate. There were a number of reasons for mitigation of punishment and for exceptions in particular cases, so that the nominal and outward form of the law lost much of its severity in the actual application. It is doubtful if, on the whole, the Chinese penalties were any more severe than those in force in England at the beginning of the nineteenth century. Yet nevertheless the impression among foreigners was that the Chinese law was full of cruel and unusual punishments, and this had much to do with creating a demand for extraterritoriality.

### *Bad Conditions in Chinese Prisons*

The prisons were not used for confinement as punishment after crime, but rather for the detention of the accused and oftentimes of the accuser and witnesses while awaiting the trial. They were ordinarily in a filthy and unhealthful condition. The prisoners were huddled together in single enclosures. Overcrowding was common. Cases of skin infection were frequent; and conditions in general were favorable to the propagation of disease. Samuel Wells Williams estimated that the number of those who died in prison was twice as great as the number of those dispatched by the executioner. He mentions that 200 deaths were reported for the Cantonese prisons in 1826 and 117 in 1831.[5]

### *Administration of Justice by Executive Officers*

Until recently there has been no separate judiciary in China. The judicial system has been in the hands of the administrative officials. The District Magistrate, who presided over the court of first instance, was also Sheriff, Tax Collector, Overseer of the Public Roads, Registrar of Lands, Famine Commissioner, Officer of Education, Coroner and Prosecuting Attorney.[6] The administrator must be a man of energy and vigorous action in upholding the majesty of the law. The rights of the state in the punishment of crime must loom larger in his mind than the rights of the

[5]S. Wells Williams, The Middle Kingdom, New York, 1883, Vol. I, p. 514.

[6]See T. R. Jernigan, China in Law and Commerce, New York, 1905, p. 35; J. Thomson, The Land and the People of China, London, 1876, p. 248.

individual. Accordingly it would be useless to expect a judicial attitude or a disposition to apply the law in a scientific manner. Furthermore the widely known corruption of the Chinese officials naturally made the westerner averse to submitting himself to their jurisdiction. Proceeds from tax collection, presents, rewards for connivance with criminality, exactions of all kinds went to make up the compensation of the under-paid official; and it was well known that bribery often controlled the decision in a case at law.

*Torture and Prejudice against the Accused*

Foreigners shrank from submission to trial by Chinese tribunals because of the methods of torture to extort testimony which were common at that time. In cases where the Magistrate believed the witness to be testifying falsely or where he refused to answer a question it was customary to apply the instruments of torture. Torture was also quite universally applied upon the person of the accused. Although presumed to be guilty no penalty could be inflicted without a confession. To obtain this confession the accused was subjected to torture.[7] The following account of an eye-witness illustrates this procedure. The accused was compelled to kneel upon chains. His hands were fastened behind his back and tied to a stake held by two policemen. He was evidently in agony, and each time he swerved to relieve the pain he was brought back to position with a blow upon the head. His cries for mercy brought forth only the answer: "Suffer or confess."[8] How repugnant such practices were in the eyes of the foreigners can readily be seen when it is remembered that in England and America not only was the accused protected against torture but he could not even be compelled to testify against himself.

*The Doctrine of Responsibility*

The Chinese law held the group for the acts of the individual. The family was held for the acts of its members.[9] This is well illustrated by a case occurring as late as 1900 in which two Chinese, who had become citizens of the United States and were residing in Honolulu, committed a political offense against the Chinese Government. Being unable to reach the offenders in Honolulu the Chinese officials proceeded by fine and imprisonment against the families of the two men in China.[10]

The doctrine of responsibility was likewise applied to foreigners as a group. If a Chinese was killed by a foreigner the Chinese officials held the foreigners of that nationality to account, demanding that they should

[7] Thomson, *op. cit.*, p. 248; Alabaster, Notes and Commentaries on Chinese Criminal Law, London, 1899, p. 17; Morse, *op. cit.*, Vol. I, p. 112.

[8] W. C. Milne, Life in China, quoted in S. W. Williams, *op. cit.*, Vol. I, p. 508.

[9] Auber, *op. cit.*, p. 56; Alabaster, *op. cit.*, p. LXX.

[10] U. S. Foreign Relations, 1902, p. 244.

surrender some one for execution, to render a life for a life. This was their attitude in the case of the Lady Hughes[11] in 1784, in the Terranova incident of 1821,[12] and in the case of the Topaze of the same year.[13]

*Prejudice of the Chinese against Foreigners*

The official class of Chinese looked upon the men of other nations as barbarians and, in a measure, without the pale of the law. "The barbarians are like beasts, and not to be ruled on the same principle as citizens. Were anyone to attempt controlling them by the great maxims of reason, it would tend to nothing but confusion. The ancient kings well understood this, and accordingly ruled barbarians by misrule; therefore to rule barbarians by misrule is the true and best way of ruling them."[14] In 1836 a complaint made to the British Foreign Office concerning conditions in China asked, among other things, that British subjects be entitled to the protection of Chinese laws, "such as they are." "Why the foreign residents of China should be regarded as without the pale of all governmental laws," the memorial continued, "it is difficult to understand; but such is the fact; for while the Chinese Government has adopted the principle that it is right to control them without laws, no foreign power affords any protection to the residents here."[15]

It was for these reasons that the principal western nations demanded and secured from China the immunities from Chinese law and jurisdiction commonly referred to as extraterritoriality, which constitute an important divergence from the principles practiced by the western nations in their dealings with one another. Great Britain was the first to secure this concession by treaty provision. This was obtained as a result of the war with China of 1839-42. Although the matter was not mentioned in the Treaty of Nanking, which concluded the war, it was nevertheless provided for in the supplementary treaty signed in 1843. The United States following this lead obtained the inclusion of extraterritoriality in the Treaty of 1844.

The provisions as set forth in the Treaty of 1844 between the United States and China, and as later amplified by the Treaty of 1880, constitute a full and explicit statement of the privileges of extraterritoriality, and may be summarized as follows:

1. American citizens who are accused of crime in China are subject to trial and punishment by the authorized American tribunal according to the laws of the United States.

[11]S. W. Williams, *op. cit.*, Vol. II, p. 451; Auber, *op. cit.*, p. 183; Morse, *op. cit.*, Vol. I, p. 102.

[12]North American Review, Vol. 40, p. 67.

[13]Morse, *op. cit.*, Vol. I, p. 105.

[14]Father Premare's translation of the Confucian commentator Su Tung-po, quoted in Morse, *op. cit.*, Vol. I, p. 112, and S. W. Williams, *op. cit.*, Vol. II, p. 450.

[15]Chinese Repository, Vol. V, p. 334.

2. Controversies between citizens of the United States and China may be settled by suit brought in the tribunal of the defendant's nationality according to the law of the defendant's nationality. An official of the plaintiff's nationality may be present.

3. Disputes between citizens of the United States in China are subject to the jurisdiction of the United States.

4. Controversies between citizens of the United States and citizens or subjects of any other government shall be regulated by the treaties existing between the United States and such government.

## SOME DEFECTS IN EXTRATERRITORIALITY

When China declared war against Germany and Austria the treaty rights of those countries were abrogated and the right of extraterritoriality was taken from them. China has refused to restore those advantages, and in the trade agreement which was signed with Germany on May 20, 1921, it was provided that the life and property of the nationals of either power traveling or residing within the territory of the other shall be under the jurisdiction of the local courts. Furthermore, in September, 1920, China withdrew recognition from the Russian Government. This left the Russians in China without any official representatives; and their cases must now be tried before Chinese officials, acting in place of the Russian consular tribunals. These steps toward the abolition of extraterritoriality have given China the hope that in the near future the entire system may be done away with. Indeed it was with such a hope that the representatives of the Chinese Republic, when presenting their case at the Peace Conference at Paris in 1919, requested, among other things, that extraterritoriality should be abolished.

In connection with this request it is necessary to discuss, first, what are the disadvantages that are claimed against the system; and secondly, whether the laws of China show promise of becoming sufficiently in accord with western standards of justice to be acceptable for the government of foreigners in that country.

Before examining the facts, however, it may be pointed out that there are strong reasons for expecting an indifferent administration of the law under a system of extraterritoriality. A crime is an offense against society which society must punish. An aroused public opinion gives vigor to the enforcement of the law, demands adequate police protection and jail facilities and upholds the hands of the judiciary. With public opinion awakened the machinery of the law will operate smoothly; but when the public slumbers an inevitable inertia results. Under a system of extraterritoriality the injured society is powerless to apply punishment to foreigners who offend against it. Foreign officials must pass judgment upon them. There is no aroused public sentiment urging the foreign government to a vigorous enforcement of its laws. An indifference results, which is only

increased by the element of racial prejudice. From this point of view it appears that extraterritoriality, however necessary it may have been, has a fundamental weakness, and that the true and normal system of criminal punishment is that which has grown up with the system of international law in the West under which the courts of a country have jurisdiction over all crimes committed within the territorial boundaries.

After extraterritoriality had been in operation for fourteen years in China the American Minister, Mr. Reed, roundly condemned the failure to punish adequately Americans who were guilty of crime in that country. He said: "We extort from China 'ex-territoriality,' the amenability of guilty Americans to our law, and then we deny to our judicial officers the means of punishing them. There are consular courts in China to try American thieves and burglars and murderers, but there is not a single jail where the thief or burglar may be confined. Our consuls in this, as in many other particulars, have to appeal to English or French liberality, and it often happens that the penitentiary accommodations of England and France are inadequate to their own necessities, and the American culprit is discharged. . . . I consider the exaction of 'ex-territoriality' from the Chinese, so long as the United States refuse or neglect to provide the means of punishment, an opprobrium of the worst kind. It is as bad as the coolie or the opium trade."[16]

This early experience has been corroborated by a number of opinions since that date. In 1864 Minister Burlingame wrote to the State Department in regard to the execution of one Buckley for the murder of a Captain McKennon: "Such men as . . . Buckley had so long escaped punishment that they had come to believe that they could take life with impunity. The United States authority was laughed at and our flag was made the cover for all the villains in China."[17] The next year Samuel Wells Williams, Chargé d'Affaires, wrote: "Cases have already occurred in China of aggravated manslaughter, and even of deliberate killing of the natives by foreigners, whose crimes have been punished by simple fines or mere deportation or short imprisonment; while foreigners strenuously insist on full justice when life is taken by the natives, or maiming with intent to kill."[18]

In 1871 Mr. Seward, Consul-General at Shanghai, wrote: "It would be difficult to say that the extraterritorial system is not often productive of injustice to the Chinese. . . . A few years ago the Viceroy at Nanking, in presenting a case on behalf of some poor boat people, whose vessel had been sunk by a foreign steamer, declared that the frequency of such accidents had so aroused the people along the river that he feared they would

[16]Sen. Doc. 30, 36th Cong., 1st sess., p. 355.
[17]U. S. Foreign Relations, 1864, Part 3, p. 400.
[18]*Ibid.*, 1865, Part 2, p. 454.

endeavor to make reprisals should the foreign courts continue to refuse redress.''[19]

In 1876 Sir Robert Hart, Inspector General of the Imperial Maritime Customs, in speaking of the defects of extraterritoriality, commented as follows: ''Chinese . . . complain that foreigners assault Chinese with impunity; that what China calls murder is invariably excused or made manslaughter by foreign courts; that where Chinese law prescribes death the offending foreigner is sentenced to only a short imprisonment; and that, while the foreigner insists that Chinese shall be punished with death where foreign life has been lost, he, on his side, expects China to accept a small sum of money in lieu of a death punishment where Chinese life is lost.''[20]

In 1883 a riot against foreigners occurred in Canton and a large amount of property was destroyed. The feelings of the people had been aroused by the killing of a Chinese by a British subject while the latter was in an intoxicated condition. There was great fear on the part of the Chinese that the culprit would either be released or escape with a trifling punishment. While they were in this state of mind another Chinese was killed by a Portuguese watchman; and then the trouble broke loose.[21]

A case occurring in 1904 will further illustrate the indifference of foreigners to crimes committed against the Chinese. In September of that year in Canton an unoffending Chinese of good standing in the community was seized by a group of drunken sailors and thrown into the water, where he was drowned. All of the witnesses subsequently examined, both foreign and Chinese, testified that the crime had been committed by American sailors. Mr. Conger, the American Minister, Mr. Rockhill, his successor, and the American Consul-General at Canton considered that the identity of the culprits as Americans had been established. But no one was ever brought to justice for the offense. A great deal of intense feeling was aroused in Canton on account of the crime; and the native and foreign press was very caustic in commenting on this apparent breaking down of justice. The native press in particular contrasted the indifference of the American enforcement of the law in this case with the unusual energy displayed in demanding redress for crimes committed against foreigners by Chinese. The American Government finally paid an indemnity of $1,500 to the family of the murdered man.[22] But the feeling was only partially allayed; and in the case of the Lienchou murders a year later, when five Americans were killed, the Canton correspondent of the *North-China*

[19] U. S. Foreign Relations, 1871, p. 170.
[20] Morse, *op. cit.*, Vol. II, p. 457.
[21] U. S. Foreign Relations, 1884, p. 46 *et seq.*
[22] U. S. Foreign Relations, 1905, p. 112; *North-China Herald*, Vol. 73, pp. 960, 1015.

*Herald* attributed the anti-American feeling, which was a partial cause of the crime, to the failure of justice in the case of the murder at Canton.[23]

An examination of the adjudicated cases compels the conclusion that oftentimes offenses committed by foreigners against the Chinese have not been rigorously punished. In a British case, reported in 1897, it was alleged that the accused, the quartermaster of an English steamer, had pushed a Chinese coolie from a pontoon alongside the steamer into the river, with the result that he was drowned. Two Chinese witnesses swore positively that they had seen the crime committed, and one Englishman swore that he had seen the Chinese slip and fall into the river. It took the British jury five minutes to reach a verdict of not guilty.[24] The *North-China Herald* in commenting upon the case said: "The philanthropist who cannot allow that the value of a man's evidence in a court of law is affected by his colour, his race or his education might be inclined to express some surprise at the issue of the trial."[25]

The failure to apply the law strictly in cases of crimes against the Chinese is most to be noted in cases coming before the consular courts. Consuls are political officials and more apt than the ordinary judge to be influenced by a regard for their own nationals. A few instances of cases arising in the United States consular courts will serve to illustrate this point.

In one case the accused was found guilty of entering a Chinese tailor shop, knocking down a Chinese boy and attempting to make away with some clothing. When the tailor tried to restrain him the accused fired a revolver at him. The accused was sentenced to pay five dollars to the tailor and was told to leave town. If he returned he would be sentenced heavily.[26] Two American sailors, who broke into a Chinese house and assaulted the occupants, were fined fifteen dollars each. The Consul said: "American sailors must plainly understand that when they come ashore in Shanghai they must behave themselves."[27] An American serving as constable of the river police at Shanghai, in compelling certain Chinese to move their boat, kicked and struck one of them, causing his death. He was sentenced by the American Consul to eighteen months' imprisonment.[28] It is difficult to conceive of a case more pregnant with possibilities of international hatred than this that a police officer of an alien nationality should so brutally mistreat a Chinese subject, and that there should be no recourse but submission to the infliction of a comparatively slight penalty upon the slayer by a foreign tribunal.

[23] *North-China Herald*, Vol. 77, p. 373.
[24] Regina *vs.* Ryan, *North-China Herald*, Vol. 59, p. 280.
[25] *North-China Herald*, Vol. 59, p. 245.
[26] U. S. People *vs.* Nash, *North-China Herald*, May 14, 1903, p. 948.
[27] U. S. People *vs.* McCoy and Taylor, *North-China Herald*, July 14, 1905, p. 100.
[28] U. S. People *vs.* J. G. Munz, *North-China Herald*, Nov. 4, 1904, p. 1043.

Undoubtedly the creation of the United States Court for China in 1906 had a very beneficial effect upon this situation. The trained judge is ostensibly more apt to make a just and impartial application of the law than a non-judicial officer. Shortly after this court was established a great deal of favorable comment was excited by the prosecutions which were instituted in it and which resulted in cleaning out certain disreputables from among the American element at Shanghai. There is no doubt that so far as the cases which come within the jurisdiction of the United States Court are concerned there has been little cause for complaint. Nevertheless shortly after the opening of this court a case arose which brought forth a protest on the part of the Chinese.

The facts were: In May of 1907 Henry N. Demenil, an American citizen, was traveling in the Province of Yunnan along the Tibetan frontier, contrary to the terms of his passport. The Viceroy of Szechwan had sent with him two Chinese soldiers to act as an escort for his protection. Becoming angry with one of the soldiers for his delay while at a small village, the American obtained possession of the rifle of the soldier and sought to frighten him by firing in his direction. The second shot struck a Tibetan lama, who was travelling along the road a short distance away, and killed him instantly. The prisoner was acquitted on the grounds that there was not the least criminal intent in his act.[29]

The Prince of Ch'ing of the Chinese Foreign Office wrote the United States Minister, Mr. Rockhill, as follows: "The decision of the judge that the affair was accidental and that no punishment should be inflicted, nor even a fine assessed for the lama's death, how can this satisfy the minds of men or display justice? . . . After thus taking human life he is not convicted of any crime, and is not even fined. The great wrong done the murdered man is not in the least atoned for. When the people of Szechwan and Yunnan hear of this the hair will rise on their heads. . . . In this case justice does not shine and the good name of America suffers."[30]

It was explained to him in reply that a fair trial had been accorded the accused, and that according to the Constitution of the United States he could not be retried. Furthermore, the American Government was unable to furnish compensation to the relatives of the deceased, as had been requested; but it was suggested that a civil suit for damages for the death of the lama could be brought against Demenil if he could be found within the jurisdiction of a competent court.[31]

In commenting on the general situation, W. W. Willoughby, an eminent political scientist with experience in China, remarks: "One cannot shut his eyes to the fact that there is usually a strong bias in favor of his own nationals upon the part of the Consul or other foreign official who

[29] U. S. *vs.* Henry N. Demenil, *North-China Herald*, Dec. 6, 1907, p. 606.

[30] U. S. Foreign Relations, 1909, p. 56.

[31] *Ibid.*, p. 62.

tries the case in which the Chinese are plaintiffs or petitioners."[32] And with particular reference to the consular courts, A. M. Latter, barrister-at-law at Shanghai, has the following to say: "The first duty of a Consul is to protect the interests of his sovereign's subjects; it is scarcely consistent to add to that duty the task of administering justice when a complaint is brought against that subject; and the duties of protection of a class and the administration of impartial justice between that class and others cannot but clash. Only too often is the verdict of the extraterritorial court a formula as of course 'judgment for the defendant,' and the defendant has then every reason to be satisfied that he has an efficient consular service."[33]

It is impossible for the powers to maintain a sufficient number of judicial tribunals in China to handle adequately the disputes that may arise throughout that country. In the early days Minister Reed wrote: "The foreigner who commits a rape or murder a thousand miles from the seaboard is to be gently restrained, and remitted to a Consul for trial, necessarily at a remote point, where testimony could hardly be obtained or ruled on."[34] There are today not less than 107 cities and towns in China that are open to foreign trade and residence. The consular tribunals are necessarily limited to a very few of these places, the United States having consular representatives at fifteen. Some of the other nations have less than this, Italy, for example, having but five.[35]

Today China is bending every effort to secure her international position on the basis of equality with other nations. Extraterritoriality is a distinct impairment of sovereignty. It is a badge of subordination that can exist today only against the will of the nation within whose territory it is maintained; and it can be maintained there only on account of superior force. It thus stands directly in the way of China's growing ambitions.

There are also certain evident disadvantages to foreigners in the system of extraterritoriality. In the first place, as long as this system remains in force China must continue, to a great extent, closed to foreign residence. At present there are certain open ports at which foreigners may reside and trade. Outside of these ports, with the exception of missionaries, who have a greater latitude, foreigners cannot permanently reside. Extraterritoriality stands as an obstacle in the way of opening China to the residence of foreigners on account of their immunity from Chinese law and the improbability that the home government will be able to supply a

[32] W. W. Willoughby, Foreign Rights and Interests in China, Baltimore, 1920, p. 72.

[33] *Law Quarterly Review*, XIX, 316, quoted in Willoughby, *op. cit.*, p. 72.

[34] Quoted from the pamphlet of the Chinese National Welfare Society in America, The Shantung Question, A Statement of China's Claims together with Important Documents Submitted to the Peace Conference in Paris, 1919, p. 164.

[35] *Almanach de Gotha*, 1921, p. 678.

sufficient number of consuls or other officials for adequate judicial purposes. Hence many business opportunities in the interior must be foregone as it is not possible to establish branch houses with resident foreigners in charge. Should extraterritoriality be abolished it is believed that the country could be opened to a much greater extent than at present.[36] It may be noted, however, that Germany, which has been deprived of the rights of extraterritoriality, has not been granted any additional privileges of trade and residence. According to the Sino-German Trade Agreement of May 20, 1921, German citizens are given the same rights to trade and residence as are open to the nationals of third nations.

Other disadvantages to foreigners are that in their dealings with one another they must take into account a confusing difference in laws; there is a wasteful duplication of courts; there is a difficulty in dealing with certain foreigners because of the inaccessibility of their courts; and there are certain procedural disadvantages resulting from the fact that the court has jurisdiction over the person of the defendant only. The plaintiff cannot be committed for contempt of court; and should the defendant have a good counterclaim to the plaintiff's action he cannot file it in the same suit but must start a separate suit in a court of the plaintiff's nationality. This last is the cause of great inconvenience as the counterclaim is a useful device frequently used in actions of a commercial nature.[37]

It may be said, however, that these disadvantages to foreigners do not seem to have appealed with any great force to the foreign residents of China, who, as will be shown later, seem only too happy to remain under the system of extraterritoriality.

It has been the general policy of the western states to stipulate for a withdrawal of extraterritoriality upon condition that the oriental state shall bring its laws into accord with the occidental standards. This was the case in the withdrawal of extraterritoriality in Japan in 1899.[38] This is the case in a number of treaties with Siam,[39] and the stipulation is likewise found in a number of treaties with China, namely with Great Britain in 1902, with the United States and Japan in 1903, and with Sweden in 1908. The clause in the American treaty reads as follows: "The Government of China having expressed a strong desire to reform its judicial system and to bring it into accord with that of western nations, the United

[36]See the article, "The Open Ports of China," by Edward T. Williams, in the *Geographical Review*, Vol. IX, No. 4, p. 306.

[37]The Imperial Japanese Government *vs.* The Peninsular and Oriental Co., 1895, Appeal Cases 644; "The Government of Foreigners in China," A. M. Latter, *Law Quarterly Review*, Vol. XIX, p. 316.

[38]See Hinckley, *op. cit.*, p. 183; John W. Foster, American Diplomacy in the Orient, Boston, 1903, p. 344, *et seq.*

[39]For the text of the American treaty, negotiated Dec. 16, 1920, see the *Congressional Record*, April 27, 1921, p. 663.

States agrees to give every assistance to such reform, and will also be prepared to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant it in so doing."

## THE CHINESE LEGAL REFORMS

Until the latter years of the Manchu dynasty the penal code existing in China was very antiquated, having been promulgated in 1647. In the period succeeding the Boxer outbreak a number of reforms were attempted, which finally, after the establishment of the Republic, resulted in the provisional criminal code of March 30, 1912. Parts of a provisional code for criminal procedure are in force, the judiciary has been reorganized and a partial codification of commercial law has been effected. The results of these enactments has been to remedy, so far as the written law is concerned, a great many of the defects of the former system. The important reforms may be summarized as follows:

### *Reform of the System of Punishments*

The old objectionable penalties have been revised in accordance with modern standards. Capital punishment by strangulation is the only death penalty retained, and this is inflicted within the prison walls. Banishment, wearing of the cangue and whipping with the bamboo have been discarded and instead a system of imprisonment and fines in accordance with modern ideas has been substituted.[40] A great many cases in which mitigation of punishment may be taken into consideration are also provided for.[41]

### *Prison Reforms*

China has made much progress in the abolition of the wretched prison conditions which formerly existed. Forty-one modern prisons had been established in 1919 in the principal cities.[42] The Rules for the Government and Administration of Prisons in China, issued by the Minister of Justice, December 1, 1913, are in harmony with modern regulations. They provide for prison labor upon useful work for which some remuneration shall be paid, rewards for good conduct and punishment for bad, proper sanitation, sufficient food and clothing for the prisoners, adequate heating at proper seasons, medical treatment and education of prisoners under eighteen years of age and for those above this age who desire it.

### *Separation and Independence of the Judiciary*

Probably what will prove to be the most far-reaching and fundamental of these reforms is the provision for a separate, independent judiciary, trained in the law. The Constitution of Nanking provides as follows:

[40]Provisional Criminal Code, Chapter VII.

[41]*Ibid.*, Chapter II.

[42]Pamphlet of Chinese Welfare Society: The Shantung Question, etc., p. 190.

Article LI. Judges shall be independent and shall not be subject to the interference of higher officials.

Article LII. Judges, during their continuance in office, shall not have their emoluments decreased and shall not be transferred to other offices, nor shall they be removed from office except when they are convicted of crimes, or of offenses punishable according to law by removal from office.

A thorough legal education is necessary for judges and professional attorneys.[43] Undoubtedly such a system will in time do much to awaken a scientific spirit in the application of the law which would have been impossible when the courts were controlled by the executive. In fact, already in at least two important cases has the Supreme Court maintained its independence against the President in one instance and Parliament in the other.[44]

### *Procedure Is More Humane*

The old system of torture to extort testimony and confessions has been discarded according to the terms of the new law. It is provided that in the trial "nobody may thereby be unlawfully subjected to any degrading treatment."[45] As to the general rights of the accused during the trial, it appears that the procedure follows the continental rather than the Anglo-Saxon system. There is a secret preliminary examination with no provision for *habeas corpus*. The jury trial, which was used in the early stages of reform, was abandoned after an unsatisfactory experience. No provision is made for cross-examination. The procedure during the trial, being left to the discretion of the judge, will depend for its fairness largely upon the character of the new Chinese judiciary.[46]

### *The New Courts*

The Law for the organization of the Judiciary provides for three grades of courts: (1) the District Court or the court of first instance; (2) the High Court or appellate court, established in the provincial capitals and at Peking; (3) the Supreme Court at Peking. According to the statement made by the Chinese representatives at the Peace Conference

[43] "Law of the Organization of the Judiciary," Chap. XII; "Brief Survey of the Chinese Judiciary," by W. Y. H., *Chinese Social and Political Science Review*, Vol. V, No. 2, p. 169; "Law Reform in China," by Wang Chung-hui, *Chinese Social and Political Science Review*, Vol. II, No. 2, p. 13.

[44] For an account of these two cases see "The Supreme Court in China," by F. T. Cheng, Millard's *Review of the Far East*, May 28, 1921, p. 673.

[45] Provisional Regulations of the High Courts and Their Subordinate Courts, Article 33.

[46] "The procedure of a trial shall be determined by the judge in accordance with the circumstances of the case, without any restrictions." Article 33, above cited; see also "Reform in Criminal Procedure," by Wang Chung-hui, *Chinese Social and Political Science Review*, Vol. V, No. 1, p. 1.

the Supreme Court and the High Courts have been established and the District Courts are in operation in forty-six districts, these being located at the more important centers of population.[47] To each of the courts are attached procurators or prosecuting attorneys.

In by far the greater number of districts the old system of courts prevails, the new courts not having been established.[48] In these districts the magistrates or administrative officers retain control of judicial matters. These officials are not part of the independent judiciary; but according to the plans of the Chinese Government this system will eventually be displaced by the establishment of the new courts all over China.[49]

From the above description of the different phases of Chinese legal reform it can be seen that thorough and scientific plans have been laid to replace the former antiquated system with one which is fully equal to those existing in western countries. A judicial system, however, involves considerations that lie deeper than the outward form as expressed in the written statute, and there is some evidence that the Chinese Government has not been able to put the reforms into full operation.

Owing to the lack of control of the central government and the failure to execute its will throughout the provinces, the new statutes, especially as to procedure, have in many cases been disregarded. Dr. W. W. Willoughby says on this point:

> Indeed, so far as the control by the central government of China of the courts in the provinces is concerned, the situation is not as satisfactory under the Republic as it was under the Empire. This lack of control was illustrated while the writer was in China. The Governor of the Province of Chekiang, as an exercise of his own personal judgment, abolished certain courts of justice which the Peking Government had established. Upon being criticized for so doing, he replied that the act had already been done and could not be corrected. He was then admonished in the future to let the central government know his intentions when he had in contemplation acts of the kind complained of. The Governor thereupon wrote his superiors at Peking that he did not wish to hear anything more about the matter since it was his opinion that the central government should never have established the courts in question.[50]

Although the code prohibits the use of torture, yet it has by no means been done away with, according to the testimony of a number of missionaries and newspaper correspondents in the interior of China. For example, the correspondent of the *North-China Daily News* for East Szechwan has written concerning the disturbed conditions in that province, stating that

[47]Pamphlet of Chinese Welfare Society, cited above, p. 188.

[48]According to Morse, *op. cit.*, Vol. I, p. 14, there were in 1906, 1470 districts in the Chinese provinces and Manchuria.

[49]For a description of the courts see "The Chinese Judiciary," by Yü Chüan-chang, *Chinese Social and Political Science Review*, Vol. III, No. 1, p. 1.

[50]Willoughby, *op. cit.*, p. 69.

there have been instances in which Chinese have been executed without trial and that torture has often been applied to obtain evidence.[51] Rev. G. G. Warren, an experienced missionary in that country, tells of several instances in the Province of Hunan in which torture has been used as in the former days.[52] And Rodney Gilbert, in an article on Russians under Chinese Jurisdiction, has set forth a number of instances of cases arising since the withdrawal of recognition from the Russian Government in which the enlightened criminal procedure above described has not been adhered to.[53]

It must be admitted that some of the evidence on this point comes from persons who are interested in the maintenance of extraterritoriality in China, and their statements must be taken with due allowance for partisanship. Nevertheless there is sufficient testimony of this sort to raise a serious question as to whether the Chinese administration of justice is, or will be in the near future, of such a quality to warrant the relinquishment of extraterritorial rights. The burden of proof is upon China. When that country is able to show affirmatively that the new system of laws has been established and is working satisfactorily and normally, then the United States should be willing and anxious to abide by her treaty promise and, in conjunction with the other powers concerned, relinquish our exceptional jurisdiction.

[51] In the issue of Jan. 5, 1920, quoted in the article, "Has Extraterritoriality Outlived Its Usefulness," *American Bar Association Journal*, Vol. VI, p. 224.

[52] "The Foreigners' Safeguard in China," *North-China Herald*, April 2, 1921, p. 45.

[53] *North-China Herald*, April 16, 1921, and April 23, 1921. See also *North-China Herald*, Vol. 115, pp. 131, 449, 826; Vol. 118, p. 426; Vol. 122, p. 678.

## EDITORIAL COMMENT

### THE SECOND ASSEMBLY OF THE LEAGUE OF NATIONS

Convened on September 5, and adjourned on October 5, the Second Assembly of the League of Nations was in session exactly one calendar month. Thirty-nine nations were represented when the session opened; three were added during the first few days; and three others, Esthonia, Latvia, and Lithuania, were admitted during the session. Thus, forty-five representatives of the fifty-one members of the League, were present. Argentina, Honduras, Guatemala, Nicaragua, Peru, and Salvador were not represented.

Dr. Wellington Koo, as Acting President of the Council, delivered the opening address, summarizing the achievements of the League since the last session, and was warmly applauded by the Assembly, the two hundred journalists, and the invited spectators in the galleries. At the afternoon session Jonkheer van Karnebeek, Minister of Foreign Affairs of the Netherlands, was elected President, and made an address in which he emphasized the substitution of law for armed force in international affairs.

On the following day, six committees were appointed, dealing with (1) Constitutional and Legal Questions; (2) Transit, Health, and Economic Matters; (3) Reduction of Armaments and Blockade; (4) Finances and Internal Organization of the League; (5) Humanitarian and Social Questions; (6) Political Questions. Thus organized, the Assembly was able at the end of the second day to take up the work of its agenda.

The first few days of the session were devoted to the discussion of the Report of the Council in a general debate, in which seventeen different nations were represented. The discussion developed very wide differences of opinion, but was characterized by much frankness of expression and in general by a spirit of toleration. The broad interval between the Council, ruled by the will and interests of the Great Powers, and the Assembly, composed largely of small States, was made evident in the course of the debate, which developed evidence of the sensitiveness of the Council to the criticisms of Members of the Assembly. This was conspicuously manifested in the rebuke administered by the First British Delegate, Mr. Balfour, to the sentiments expressed by Mr. Branting, the First Delegate of Sweden, who expressed the conviction that the Council had not risen to the height of its opportunity. It was evident throughout the meeting that the reservation to itself by the Council of exclusive authority to make certain deci-

sions is not agreeable to the representatives of the smaller States, the influence of which, even in its aggregate, where it would be reasonable that it should count, does not have its due effect. As time goes on, there promises to be an urgent endeavor to determine whether four Great Powers, one of them Asiatic and three European, shall be able with the assent of one of the temporary Members of the Council to lay down the law to the Assembly, composed of over fifty States, yet unable to share in important decisions affecting their interests.

The one great triumph of the meeting of 1921 was the success of the plan for the election of a Permanent Court of International Justice. It had been feared that, since the Council and the Assembly were to vote separately in the election of candidates, already nominated by the Hague Tribunal, it might require many days to complete the election. To the gratification of all the result was accomplished without long delay and without friction between the two electoral bodies, although their ballots differed somewhat persistently. The Committee of Mediation provided for in the Court Statute was necessary to break a deadlock, but its good offices were adequate, and fifteen eminent men were chosen to constitute the Court. Among the nine judges who obtained an absolute majority in both bodies was our fellow-countryman, the Honorable John Bassett Moore.

Regret was expressed by representatives of other countries that the American members of the Hague Tribunal had not participated in the nomination of candidates, and that the United States was not represented in the electoral bodies. It was understood that this abstention not only reaffirmed the decision of the United States not to become a Member of the League but that it went far toward emphasizing the fact that the Court, although representing so many States, is not, and is not likely to be, recognized as an international tribunal in the full sense, since representation in it is, by the Statute of the Court, primarily confined to members of the League, with permission to outsiders to appeal to the Court only on conditions to be laid down by the Council. It is, therefore, open to the observation that it is not a universal court but the private court of the League.

The failure to accept the full jurisdiction of the Court, without the consent of both parties, even in justiciable cases, does not advance judicial resort beyond individual option, and thus, although a tribunal is created, it is accessible only as between those nations who mutually agree in each case to submit to its judgments. Happily, eighteen States have now accepted complete jurisdiction in all justiciable cases.

Turning now to some of the more vital matters discussed by the Assembly, but without attempting an exhaustive treatment of the conclusions reached, one of the most important was the reduction of armaments. The fact that the cost of military establishments in Europe is now, notwithstanding the conventional disarmament of Germany, more than three

times what it was before the Great War, rendered the problem a pressing one. The idea of budgetary control, together with the prohibition of the manufacture and traffic in arms, was the subject of an elaborate report and of discussion. The conclusion reached was that, "valuable and important as the proposals are which have been discussed, it is nevertheless true that they do not touch the kernel of the question. If they were all carried out, only preliminary steps would have been taken toward the limitation of armaments."

It is provided in Article 8 of the Covenant that the Council shall "formulate schemes" for the reduction of armaments, and it was brought to the attention of the Assembly that no such scheme had been formulated. It was natural, therefore, that the Council should be urged to perform this duty, and this is in substance the recommendation made.

The recommendation presents, and appears to have been felt to offer, only a faint hope of results. The truth is, that the reasons for armament are conditions over which the Council has little control, unless it decides to resort to force, which it is disinclined to do. The dictation of the Council on the subject of armament would be resented, and the exhortations it might make to diminish it would have greater influence if they were reinforced by example, which thus far has not been made impressive. It lies with the States which are armed against one another themselves, by their mutual conciliation of their interests and assurances of peaceful purposes, to remove the causes of armament. Unfortunately, the difficulty of this procedure is increased by the fact that the boundaries of many of the States and the economic consequences of these divisions were imposed by the Supreme Council of the Allies at Paris, and were not adjusted by mutual agreement between the States themselves. Not until this latter method is resorted to and the community of interest between them is made the basis of understanding by their own acts, will the reduction of land armament have any prospect of achievement.

The conclusion reached in the Assembly was that "there seems to be no reason why the Council, in performance of the duty imposed upon them by the Covenant, should not lay down the general lines of a policy for the limitation of armaments." The important matter, however, is not the general lines of policy but the actual acceptance of definite apportionments by the different armed powers, now so numerous and independent. They would be likely to accept the policy "in principle," and then debate regarding their apportionment before the Council, stating their reasons why they could not accept it. Such a procedure would, of course, lead to nothing. They would insist, and not without reason, upon being the final judges of what armed defense they need.

The truth of this statement seems to have been finally grasped by the Committee of the League, which says in its Report, referring to the United States: "The naval strength of this Power makes any scheme of naval

disarmament impossible without her support, and it is for this reason, among others, that the Committee warmly welcomes the forthcoming Conference at Washington, and trusts that it may be fruitful in securing a large measure of reduction of armaments."

Generalizing this statement, it is evident that no strong country will permit its armament to be reduced by dictation. It will reduce its armament only by its own consent. If, therefore, the European nations will themselves propose to one another a reduction in their own armaments, following the example of Washington, in a manner to reduce the existing means for national defense proportionately, there is no reason why immense reductions could not be immediately made; and, if accompanied by reciprocal economic arrangements between them, the remedy for the impoverishment of Europe would be found to be in its own hands.

Such a procedure would imply a change in the method of the League of Nations. It would involve the substitution of cooperation and mutual agreement for coercion and the enforcement of obligations.

Such a change of method was foreshadowed in nearly every report and in the general trend of discussion throughout the whole session of the Assembly. This was particularly noticeable in the matter of proposed amendments to the Covenant.

A preliminary question regarding amendments produced a hesitation to proceed in a radical manner, since some members of the Assembly believed that unanimity was required, while others objected that this would make amendment almost impossible. As the Covenant itself makes no provision as to the method of submitting amendments to the nations for their ratification, and a division of opinion was evident and might lead to extensive controversy, it was unanimously decided that provision should be made for future amendment by a three-fourths majority of the Assembly and that no amendment should be made at the time without the assent of three-fourths of the members.

No amendments of vital importance were, in fact, definitively adopted, but several were rejected. The Canadian proposal to eliminate Article 10 from the Covenant was postponed till the next meeting. The Argentine proposal that "all sovereign States recognized by the Community of Nations be admitted to join the League of Nations in such a manner that if they do not become Members of the League this can only be the result of a decision on their part," was considered at length; but, in the absence of the Argentine Delegation, a decision was deferred. The Colombian proposal that unanimity be not required for Assembly decisions regarding articles of the Covenant was withdrawn.

The Czecho-Slovak amendment regarding the approval of special agreements between a limited number of members of the League was not adopted, it being apprehended that some agreements of this kind might

result in combinations that would not be in the spirit of the League, though others might be of great advantage.

The conviction that certain radical changes in the Covenant would eventually have to be made was general. Some of the obligations of the Covenant had clearly awakened fears that it would be difficult and even impossible to fulfill them. They were, therefore, brought forward with a view to modifying them by interpretation.

The purpose of Article 18, for example, was to prevent the making of secret treaties. It was known, however, that several military conventions had been signed which had not been and probably would not be registered. What then was to become of the obligation of that article, which requires that all treaties, in order to be binding, must be registered with the League? To cover the military engagements, it was proposed in committee that "treaties of a purely technical or administrative nature which have no bearing on international political relations" need not be registered. The equivocal character of this proposal was evident, and when it came before the Assembly it was pointed out that it might fatally invalidate Article 18. It was, therefore, not adopted as an amendment, but passed on to the next Assembly, with the understanding that, "in the meantime, Members of the League would be at liberty to interpret their obligations under Article 18 in conformity with the proposal made."

The obligations incurred under Article 16, which proved such an insurmountable obstacle to acceptance of the Covenant by the United States, were made the object of an analysis which went to the very heart of the compact.

This article provides that, "Should any Member of the League resort to war in disregard of its covenants under Articles XII, XIII, or XV, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations," etc.

The evident inconvenience of fulfilling this obligation, the possible consequences of loss to the nation severing all trade and financial relations with a neighboring State upon which it was economically dependent, and the impossibility of making such an economic blockade effective when undertaken against a strong nation, had caused a general disposition to modify this article. It was argued in the Special Blockade Commission that an "*act* of war" is not necessarily a "*state* of war," and therefore the obligation would not automatically go into effect, unless a member of the League chose to consider it a "*state* of war"; a subterfuge the transparency of which is clear the moment it is considered that by the terms of the article it is explicitly an *act* of war which brings the obligation into operation, and not a *state* of war; a consideration which renders the attempt to make a distinction between an act and a state of war wholly beside the mark.

The second attempt to evade the obligation of the article was the proposal to interpellate between an act of war and an economic blockade a decision by the Council that the obligation had come into effect as a necessary preliminary to action; a decision wholly superfluous if not positively ruled out by the precise terms of the article, which not only makes no mention of the Council with reference to economic blockade but distinctly pledges all the members of the League severally and *immediately* to sever all trade or financial relations. It is not until military or naval force is brought into question that the Council, according to Article 16, has any part to play in punishing a delinquent. It then becomes the duty of that body "to recommend to the several Governments concerned what effective military or naval force the members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League."

Interpretation having thus failed utterly to soften the obligation of each member severally and immediately to institute an economic blockade against an offender,—a duty upon which so much reliance was placed as a means of avoiding sanguinary war,—a series of amendments to the Covenant were approved by the Assembly without dissent, subject to the prescribed ratification of all the members of the Council and half the states represented in the Assembly. The first amendment thus adopted was that it is for the Council to give an opinion whether or not a breach of the Covenant has taken place, though it rests with each State to make its own final decision in this matter in so far as its responsibilities are concerned.

In order to secure identity of action, another amendment was accepted, to the effect that the Council will notify all members of the League as to the date which it recommends for the application of economic pressure under this article, and until this is done no action is to be taken.

Thus, the economic blockade which was imposed automatically and imperatively upon all members of the League in case of violation of the Covenant, is to occur, if at all, only when the Council, in which one single vote can prevent action, recommends it and fixes the date. Pending formal ratification, these provisional amendments are to constitute "the rules for guidance" for members of the League.

As to Mandates, it is difficult to find evidence that the Assembly has any serious control over them. They were discussed on the basis of a report by a special committee, and the report was approved by the Assembly. Certain members were disposed to press for an immediate definition of Mandates, but the Assembly finally assented to leaving the whole subject in the hands of the Council, which desired not to be embarrassed pending negotiations with the United States. The Official Summary of the Secretariat states, that "the Mandate situation has generally been admitted to be one of great importance and of great difficulty, and there was a considerable divergence of opinion." The conclusion appears to be war-

ranted that, if it was the original intention to internationalize in any real sense the great areas taken from Germany in Africa and the Pacific Ocean, and from Turkey in Asia, that purpose has not been realized.

With regard to the League of Nations generally, as its actual character was manifested in the sessions of the Second Assembly, it would appear that it is undergoing a radical transformation not contemplated by its founders. By its statutes it is undoubtedly a super-government. In actual practice it is not. The central and controlling international authority in Europe is not the League, but the Supreme Council of the Allied Powers. To a certain extent the members of the Supreme Council and the Council of the League are identical, but all the force being in the Supreme Council and only the obligations in the League, it is the former that is the only super-government in the proper sense of the word.

The Assembly without the Council would be a more useful body than it is, for it would then have an increased sense of responsibility. That it is even now in many respects useful admits of no doubt. It discusses with great intelligence many current questions. The Secretariat is a busy international clearing-house served by capable and industrious men. It does what such an office can, but it is without decisive authority. So long as the Supreme Council continues, the League can have no other authority than that which the Supreme Council permits it to have; and that is none, apart from the powers of the League Council which it controls.

The impression one derives from the Assembly is that it is inspired by noble motives but lacking in courage. It does not venture boldly to lay hold upon the most vital realities of the European situation. It is not fully representative of Europe; and, bound by its Covenant, which is an article in a treaty of peace imposed by war, it cannot be. Its most far-sighted members know this and privately admit it. I thought that, in some cases, they recognized this with sadness. Quite evidently, the League is gradually seceding from the obligations of its Covenant. To become a real association for peace, it must transform itself fundamentally. And this, in my belief, it will continue to do. At present it is just a "league," not the Society of Nations.

I cannot close this editorial without a personal word of appreciation of the courtesy, the hospitality, and the fine faith and devotion of the personnel of the Secretariat of the League, some of whom are our own fellow-citizens, whose place is made less happy because their country is not a member of the League. It is greatly to their credit that with patience and unfailing courtesy they are willing to listen to the reasons why it is not a member.

DAVID JAYNE HILL.

## SOME THOUGHTS ON THE MEXICAN OIL QUESTION

It is impossible in a brief editorial to go into all the minutiæ of this perplexing and complicated question. Nevertheless it may be of value to lay before the reader some of the considerations involved and the general rules growing out of the intercourse of sovereign states which relate to such problems.

For certain purposes, mineral oil has replaced coal as a desirable fuel. The oil measures thus far uncovered in Mexico involve vast pools quickly drained, so that their regulation is of immediate importance. Mexican oil is not locally used but is exported. That country is potentially rich in many products but actually poor and torn by years of factional conflict.

It is natural and legitimate therefore that any government in Mexico should desire to realize as much as possible from its mineral assets. Some two hundred million dollars of American money are estimated to have sought investment in Mexican oil. There has thus arisen a conflict of interest between the foreign capitalist who desires to mine and export oil as cheaply as possible and the sovereign which wishes to make as much as possible out of its product before it is taken out of its jurisdiction. This is attempted in two ways, by taxation and by a duty on exports.

Under Mexican law aliens may not hold land. This is the law in many other countries also and in some of the states of the American Union. To exploit Mexican oil territory, therefore, local companies were organized under local law but employing foreign capital. The possession of the surface carried with it the sub-soil minerals, including petroleum. If disputes arose the foreign lessors or owners relied upon the help of their governments when the protection of the courts seemed to fail them. Their suspicions were roused by a demand of the Mexican Government that interests in such companies owned by alien capital must renounce this right to protection from their governments. There also appeared a tendency on the part of the Mexican Government to separate surface and sub-soil interests, nationalizing the latter. But in the main oil rights acquired by aliens were undisturbed until 1917, when the new Constitution appeared. This had been adopted under Carranza's influence. The Pershing invasion of Mexico and the Mexican intrigue with Germany aimed at the United States, prior to this, naturally led to distrust of Carranza's good faith. The new Constitution made a radical change in the oil situation, though explicitly providing that it and the legislation growing out of it should not be retroactive.

It separated surface from sub-soil property, nationalizing the latter. It required payment for oil taken out in the shape of rentals and royalties to the government.

On failure to comply with various rules and regulations, it threw lands open to new entries.

It held that "foreign capital shall submit to the new laws by waiving its nationality and organizing as Mexican corporations."

And it attempted to condition drilling permits upon compliance with recent decrees. Moreover it conditioned continued operation of oil lands upon government regulations yet to be issued.

There was further a disposition shown, in spite of the non-retroactive clause of the new Constitution, to apply these new conditions to oil leases previously acquired. Such leases were protected by the court if work had been done on them, but not if sub-soil rights existed only in "expectancy," the Supreme Court granting the owner merely "the faculty of exploring and exploiting" and recognizing acquired rights only when this faculty had been "translated into positive acts" before May 1, 1917, the date of the new Constitution. I quote from a discussion of the Texas Company's *Amparo* case in the November journal of the American Bar Association by Edward Schuster of New York.

The Supreme Court also declared the export duties upon oil to be constitutional.

Enough has been said to describe the nature and variety of the attacks upon foreign oil property in Mexico. Each step in restriction was met by diplomatic argument and remonstrance. This brings us to the main point at issue. How far may a government go in protecting the property rights of its citizens against attack, executive, legislative and judicial, in a state with which that government is at peace?

Fundamentally beyond question, a state may do what it likes within its own jurisdiction. If unduly restrictive its acts shut out foreign capital. If it invites foreign capital, such policy implies protection. But in no case does foreign capital enjoy rights superior to the native.

There is a passage in one of Webster's papers as Secretary of State in 1851 which states clearly, and correctly as the writer thinks, the status of the nationals of one country resident in another, of a less advanced civilization:

> They have chosen to settle themselves in a country where jury trials are not known; where representative government does not exist; where the privilege of the writ of *habeas corpus* is unheard of; and where judicial proceedings in criminal cases are brief and summary.
>
> Having made this election, they must necessarily abide its consequences. No man can carry the ægis of his national American liberty into a foreign country and expect to hold it up for his exemption from the dominion and authority of the laws and the sovereign power of that country, unless he be authorized to do so by virtue of treaty stipulations.

If true of alien persons, it is still more true of alien property.

Such is the general principle involved. But there are two contingencies when protection to property rights thus situated and thus jeopardized is due. First in case of discrimination; second in case of confiscation.

If a country learns that its subjects are placed in a foreign state in an inferior position to the subjects of other foreign states there resident, then a remedy for this inequitable inferior position is due him.

It is I believe but justice to say that there is no claim and no evidence that Mexico has thus discriminated between aliens. But as the interests of our nationals are large, those interests have suffered largely.

Nor is there direct evidence of confiscation pure and simple. Heavy burdens have been placed by the policy and the legislation of Mexico upon foreign capital which may prove too grievous to be borne. Whether such burdens are tantamount to confiscation, while judicial protection is wanting, whether therefore protection from our own government is due, is a difficult question, which must be determined by the circumstances of each case and the animus shown by local authority.

That Mexico should drive out foreign capital and hinder her own development by burdens of many kinds too heavy to be borne is unjust and foolish, but it is not illegal in the eye of international law. For we must always remember that Mexico is a sovereign State. We must either respect her sovereignty or deny it, placing her in the category of countries which are so devoid of political organization and civilized status that they can be dealt with only by force. We cannot mix the two.

T. S. WOOLSEY.

## LANDING AND OPERATION OF SUBMARINE CABLES IN THE UNITED STATES

By an Act of Congress, approved May 27, 1921,[1] license from the President of the United States is required for landing and operating submarine cables connecting the United States with a foreign country, and in general, such submarine cables are placed under administrative control.

This is consistent with the established policy of the United States, particularly since 1869, though occasionally there have been official rulings which were not in complete accord with this policy.

The landing of submarine cables was particularly brought to the attention of the authorities of the United States through the attempt, by the Western Union Telegraph Company, to land at Miami Beach, Florida, without full governmental authorization, a cable connecting with British lines. There is much material upon this matter, such as official correspondence, hearings before the Senate, and court proceedings. Such correspondence as the following shows something of the situation:

[1] Printed in the Supplement to this JOURNAL, p. 35.

MIAMI, FLA., August 24, 1920.

ADMIRAL E. A. ANDERSON,
United States Navy,
Miami, Fla.

DEAR SIR:

The following message has just been received by me from General Traffic Manager Blonheim, New York, with a request that I submit the same to you:

"Acting under the usual form of permit from the War Department, which type of permit has always been sufficient for laying cables in inland waters, we have assembled the labor and materials at Miami and are dredging the trenches at the draws. To delay this work entails unnecessary expense for labor and may render it necessary to redredge, and in the circumstances we should be allowed to proceed.

"This new route between Miami Beach and Miami is much needed for our Key West connection irrespective of what may be the final decision about the Barbados cable."

Will you kindly reply at your earliest convenience?

Yours truly,
J. F. RICHARDS,
Cable Superintendent.

MIAMI, FLA., August 24, 1920.

MR. J. F. RICHARDS,
Cable Superintendent.

SIR:

Referring to your letter of this date I have to inform you that the Navy Department has taken up the question of running the cable between Miami and Miami Beach with the State Department. I will be informed of the decision. Pending such information my orders will not permit the running of this cable.

Respectfully,
E. A. ANDERSON,
Rear Admiral, United States Navy.

MIAMI, FLA., August 26, 1920.

MR. J. F. RICHARDS,
Cable Superintendent.

SIR:

A dispatch from the Navy Department, received this date, directs me not to permit the laying of the cable between Miami and Miami Beach until instructions are received.

Respectfully,
E. A. ANDERSON,
Rear Admiral, United States Navy.

The Navy Department, thus called upon to prevent landing, carried out instructions.

The Courts were asked to issue an injunction enjoining the Secretary of the Navy from preventing the landing of the cable. The latter passed through the lower courts up to the Supreme Court where the case was pending when the Act of Congress was passed.

This law placing administrative control of the cable landing in the hands of the Executive is in conformity to long practice. Authority to withhold or revoke the license on just ground is retained, while vested interests are protected. There is also provision for initiating procedure

by the Government itself, and the Act is extended to all territory under the jurisdiction of the United States.

The law of May 27, 1921, embodies the accepted principle of the right of a state to exercise jurisdiction within its own boundaries.

GEORGE GRAFTON WILSON.

## THE RESOLUTION OF THE CONFERENCE ON LIMITATION OF ARMAMENT RESPECTING EXTRATERRITORIAL RIGHTS IN CHINA

Every friend of China must experience gratification in the Resolution of the Conference on Limitation of Armament, December 10, 1921, dealing with extraterritorial jurisdiction in that country. In its preamble that Resolution takes note of the various treaties whereby the United States and Great Britain and Japan have within a score of years agreed to aid China in judicial reforms with a view to ultimate relinquishment of extraterritorial rights.[1] It announces the sympathetic disposition of the assembled Powers towards the aspirations of China respecting jurisdictional and political and administrative freedom; it emphasizes the circumstance that appropriate action depends upon "the ascertainment and appreciation of complicated states of fact in regard to the laws and the judicial system and the methods of judicial administration of China" which the Conference is not in a position to determine. It is accordingly resolved:

> That the governments of the Powers above named shall establish a commission (to which each of such governments shall appoint one member) to inquire into the present practice of extraterritorial jurisdiction in China and into the laws and the judicial system and the methods of judicial administration of China, with a view to reporting to the governments of the several Powers above named their findings of fact in regard to these matters and their recommendations as to such means as they may find suitable to improve the existing conditions of the administration of justice in China and to assist and farther the efforts of the Chinese government to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality.

It is declared that such Commission, to be constituted within three months after the adjournment of the Conference, is to be instructed (in accordance with detailed arrangements to be agreed upon) to submit its

[1] See also in this connection Act of March 23, 1874, Chap. 62, 18 Stat. 23, contemplating the relinquishment of the exercise of judicial functions by American officials in certain countries upon receipt by the President of satisfactory information that there were organized therein local courts on a basis likely to secure to citizens of the United States the same impartial justice which they then enjoyed by virtue of the exercise of judicial functions by American officers.

report and recommendations within one year after the first meeting of the Commission. Each of the Powers retains the right to accept or reject all or any portion of the recommendation of the Commission; but in no case is its acceptance of any portion thereof either directly or indirectly to be dependent on the granting by China of any special concession, favor, benefit or immunity, whether political or economic. Provision is also made for the adherence to the Resolution of non-signatory Powers having by treaty extraterritorial privileges in China, upon specified notice of their accession thereto. An additional Resolution adverts to China's satisfaction in the sympathetic disposition of the Powers assembled, and to its declared intention to appoint a representative to sit with the Commission as a member thereof, and to China's freedom to accept or reject any recommendations of that body; and it announces, furthermore, the readiness of China to cooperate in the work of the Commission and to afford it every possible facility for the accomplishment of its tasks.

It seems worth while to take note of a few considerations which must and doubtless will be reckoned with by the Commission in undertaking to formulate practical constructive plans.

Heretofore, in arrangements for the relinquishment of extraterritorial jurisdiction, the establishment and operation of judicial reforms have been regarded as a condition precedent to the surrender of jurisdictional rights. Thus President McKinley, in his message of December 5, 1899, dwelt at length upon the achievement of such reforms by Japan prior to the operation August 4, 1899, of its treaty with the United States of November 22, 1894, contemplating the relinquishment of extraterritorial jurisdiction.[2] The annex to the recent treaty between the United States and Siam of December 16, 1920, also gave heed to that principle.[3] In the present case it may be assumed that the Commission will make earnest endeavor to advise or devise such judicial reforms as are deemed essential to enable Chinese courts to bear well the burdens to be imposed by any transfer of jurisdiction to them.

There are, however, certain other considerations which although indirectly related to the matter of judicial reform, appear to have a distinct bearing upon the solution of the complicated problem involved. Attention is briefly called to a few of them.

The Republic of China asserts dominion over a vast area wherein its claims of sovereignty are undisputed by foreign states. Its population is thus spread over a wide territory within relatively small parts of which

[2]U. S. For. Rel. 1899, XXIV.

[3]U. S. Treaty Series, No. 655. It may be observed that this treaty was proclaimed by President Harding, October 21, 1921.

The Treaty of Sèvres of August 10, 1920, did not appear to contemplate any relinquishment by the Powers of extraterritorial privileges in Turkey, but rather a plan looking to the modification or reform of the Capitulary system there prevailing. See Art. 136, Supplement of this Journal, XV, 179, 207-208 (July, 1921).

there is contact with the western world or with the civilization produced by it. The situation in this regard differs sharply from that which has ever confronted either Japan or Siam. In certain parts of China there is believed to remain much difficulty (apart from any of a purely legal or constitutional aspect) in protecting foreign life and property from injustices begotten of ignorance or passion. States avowing attachment to the principles of western civilization have experienced a like difficulty when possessed of extensive territories. Mexico has always been face to face with it. Less than fifty years ago the United States found itself, in the circumstances of the particular case, either unable or unwilling to protect numerous Chinamen in Wyoming against wholesale mob violence. Thus, in the case of China, the question arises as to what should be the territorial limits within which extraterritorial jurisdiction may wisely and ultimately be relinquished. If those limits should not be co-extensive with the territory under the flag of the Chinese Republic, there still remains the problem as to whether they should be extended to all places open to foreign trade or residence, or to foreign missionary enterprise; or whether the opening by Chinese authority of any place to any form of foreign life should simultaneously operate to clothe Chinese tribunals with fresh rights of jurisdiction therein; or whether some other principle should indicate the geographical bounds within which a transfer should be effected. Obviously the fitness of any Chinese courts, especially those of first instance, to adjudicate with respect to foreigners would seem to be dependent in large degree upon the location of the forum in a community in close contact with western life by reason of the number of the aliens there residing. The Commission may possibly, therefore, reach the conclusion that, at the appropriate time, the yielding of jurisdiction to Chinese tribunals should generally follow a scheme of geographical progression, limited at first to zones or areas wherein conditions are acknowledged to be most favorable for the successful operation of the transfer.

Experiments in the exercise of Chinese jurisdiction over foreigners are likely to be most fruitful in cases where the consequences of a denial or miscarriage of justice serve to expose to the smallest degree of harm the alien litigants involved. Thus jurisdiction in civil matters (under a code sharply distinguishing civil from criminal procedure, and preventing the imposition of criminal penalties in cases arising from tort or contract) may be deemed worthy of relinquishment prior or preliminary to the surrender of jurisdiction over criminal cases. Again, distinctions according to the nature of offenses may suggest a reasonable theory or method of giving up jurisdiction in criminal matters. Thus it may be deemed expedient at the outset to test Chinese magistrates sitting as criminal judges with adjudications over offenses regarded (at least in America or England) as misdemeanors, before yielding jurisdiction in cases where the offense possesses the character of a crime, and would in consequence, according to

the codes of any of the interested foreign Powers, subject a guilty person to the imposition of a grave penalty. If jurisdiction is to be ultimately relinquished to Chinese courts where aliens are charged with the commission of heinous offenses, ample provision for appeals by the simplest processes and to the Supreme Court of the Republic should obviously safeguard the rights of accused persons, especially if they are deprived of recourse to the judicial as distinct from political aid of their own countries.[4]

In its exercise of duties of jurisdiction a state may find that certain of its tribunals and processes which amply suffice in the administration of justice with respect to nationals are wholly inadequate when an alien is a party to the litigation, and especially if he be the victim of local prejudice. The United States has had such an experience. In cases, for example, arising from mob violence directed against resident aliens, it has been found impossible to convict offenders in the State courts.[5] Both the Constitution of the United States and certain acts of Congress have given heed to the general problem, by conferring upon aliens the right under some circumstances to invoke the aid of the Federal Courts.[6] Such action is not designed to afford the alien more favorable treatment than is accorded the national, but rather to place within reach of the former by a different process, an equal opportunity to secure such a degree of justice as should be available to every resident who invokes the aid of the courts. This principle is to be reckoned with in any project purporting to clothe Chinese courts with jurisdiction over aliens. It may be found that there exist, or are capable of establishment, certain Chinese tribunals which, by reason of their composition or grade or organization or personnel are peculiarly fitted for the task of adjudication, and, like the Federal courts of the United States, able to afford a solid means of protecting the rights of alien litigants. Such tribunals should be utilized accordingly, regardless of

[4]According to Prof. Willoughby: "The most promising mode by which the Chinese could be aided in bringing about a situation under which it would be expedient to abolish extraterritoriality would be for the Powers to permit the Chinese, as a first step, to establish courts for the trial of cases in which foreigners are parties either as defendants or plaintiffs, that would be truly 'mixed' in character; that is, tribunals presided over by two or more judges of whom one at least should be a foreigner learned in the law and experienced in its administration. These courts would be Chinese courts, and the judges Chinese officials, the judges who are foreigners, however, to be appointed upon the nomination of, or at least, with the approval of, the foreign offices of the Treaty Powers." (W. W. Willoughby, Foreign Rights and Interests in China, Baltimore, 1920, 79-80.)

[5]In at least two instances, however, damages have been collected by dependents against a county or municipality rendered liable in such cases by local statute, through an action maintained in the Federal Court.

[6]See Constitution, Art. III, Section 2; see also paragraph 17 of Federal Judicial Code, 36 Stat. 1093, clothing the District Courts of the United States with original jurisdiction "of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States."

local practices or laws withholding from them jurisdiction in matters pertaining solely to nationals of China.

A further consideration must not go unheeded. It might prove disastrous to yield irrevocably privileges of jurisdiction, in spite of judicial reforms or geographical limitations or skilfully devised restrictions and distinctions pertaining to criminal matters, until at least after the lapse of an experimental period. The success of Chinese judges in administering justice in matters concerning solely Chinese litigants or Chinese persons charged with crime under the most approved system devised to safeguard the rights of such individuals would hardly suffice as a test. There would seem to be required opportunity for Chinese tribunals under a new régime to adjudicate with reference to aliens under conditions such that in the event of an abuse of power, cases might be removed by a process of requisition to the judicial authorities of their own State. The recent convention with Siam offers an interesting precedent. It will be recalled that it is there provided that pending a certain interval of time following the promulgation and operation of certain specified laws and decrees, the diplomatic or consular representative of the United States may requisition causes pertaining to American citizens pending in the lower Siamese courts. This principle may be well applied and extended in the case of China. The Commission may, for example, wisely conclude that during a specified interval of time the appropriate foreign authority may requisition cases pending in the Chinese courts, and even in communities where there is reason to believe that the relinquishment of jurisdiction is most safely yielded. During such an experimental period it may be fairly presumed and possibly provided in terms, that normally cases should be left in Chinese hands, and that no requisitions should be made on frivolous grounds or at the caprice of a foreign official. Moreover, it may even be provided that where a case is requisitioned the appropriate Chinese code rather than that of the foreign State should be applied by its judicial representative. The principle needs emphasis in any formal plan for ultimate adoption that the experimental period is designed not merely to safeguard foreign rights, but equally with a view to ascertain the essential fitness of Chinese tribunals to exercise jurisdiction over foreigners.

The western world is far from disposed to thwart the aspirations of China. The Resolution of the Conference reflects the general sentiment. Chinese statesmen may, however, serve well their own country by perceiving that the shortest path to the attainment of jurisdictional independence is likely to involve the early and complete satisfaction of a series of elementary and progressive tests to be laid down by friendly foreign Powers.

CHARLES CHENEY HYDE.

## UPPER SILESIA

On October 12, 1921, the Council of the League of Nations unanimously adopted a recommendation fixing the boundary line between Germany and Poland in Upper Silesia as follows:

> The frontier-line would follow the Oder from the point where that river enters Upper Silesia as far as Niebotschau; it would then run towards the northeast, leaving in Polish territory the communes of Hohenbirken, Wilhelmsthal, Raschutz, Adamowitz, Bogunitz, Lissek, Summin, Zwonowitz, Chwallenczitz, Ochojetz, Wilcza (upper and lower), Kriewald, Knurow, Gieraltowitz, Preiswitz, Makoschau, Kunzendorf, Paulsdorf, Ruda, Orzegow, Schlesiengrube, Hohenlinde; and leaving in German territory the communes of Ostrog, Markowitz, Babitz, Gurek, Stodoll, Niederdorf, Pilchowitz, Nieborowitzer Hammer, Nieborowitz, Schönwald, Ellguth, Zabrze, Sosnica, Mathesdorf, Zaborze, Biskupitz, Bobrek, Schomberg; thence it would pass between Rossberg (which falls to Germany) and Birkenhain (which falls to Poland) and would take a northwesterly direction, leaving in German territory the communes of Karf, Miechowitz, Stollarzowitz, Friedrichswille, Ptakowitz, Larischhof, Miedar, Hanusek, Neudorf-Tworog, Kottenlust, Potemba, Keltsch, Zawadski, Pluder-Petershof, Klein-Lagiewnik, Skrzidlowitz, Gwosdzian, Dzielna, Cziasnau, Sorowski, and leaving in Polish territory the communes of Scharley, Radzionkau, Trockenberg, Neu-Repten, Alt-Repten, Alt-Tarnowitz, Rybna, Piassetzna, Boruschowitz, Mikoleska, Drathhammer, Bruschiek, Wüstenhammer, Kokottek, Koschmieder, Pawonkau, Spiegelhof (Gutsbezirk), Gross Lagiewnik, Glinitz, Kochschütz, Lissau.
>
> To the North of the last place, it would coincide with the former frontier of the German Empire as far as the point where the latter frontier joins the frontier already fixed between Germany and Poland.[1]

Although in the form of a recommendation, the action of the Council had the effect of a final decision, as each of the governments represented in the Supreme Council of the Allied Powers, by which body the question had been submitted to the Council two months earlier, had "formally undertaken to accept the solution recommended by the Council of the League."[2]

The history of this difficult and important decision relates back to the Treaty of Versailles and the efforts of the framers of that settlement to apply President Wilson's principles. Under the original conditions of peace handed to the German peace delegation on May 7, 1919, Upper Silesia was to be ceded to Poland, but as the result of the German protest against the proposed cession, it was decided to modify this portion of the peace terms so as to provide for a plebiscite. In communicating this modification to Germany the Allied Powers solemnly declared that it is not true that Poland "possessess no rights capable of being maintained in accordance with the principles of President Wilson" and that they "would have

[1] Minutes of the extraordinary session of the Council of the League of Nations, Aug. 29-Oct. 12, 1921, p. 19.

[2] Note transmitted by M. Briand to Viscount Ishii, August 24, 1921, Minutes, *ibid.*, p. 15.

entirely violated the principles which the German Government itself claims to accept, if they had not taken Polish rights over this district into account." Since, however, the German Government maintained "that separation from Germany is not in accordance with the wishes or interests of the population, the Allied and Associated Powers are disposed to leave the question to be determined by those whom it particularly concerns."[3]

The final terms of the Treaty of Peace were amended accordingly. Germany renounced in favor of Poland "all rights and title over the portion of Upper Silesia lying beyond the frontier line fixed by the Principal Allied and Associated Powers as the result of the plebiscite" (Art. 88, Treaty of Versailles). German troops and officials were required to evacuate the territory within fifteen days, and it was placed immediately under the authority of an international commission designated by the Allied and Associated Powers and occupied by their troops (Annex to Art. 88). The international commission was charged with the duty of insuring the freedom, fairness and secrecy of the vote, the result of which "will be determined by communes according to the majority of votes in each commune." Section 5 of the annex provides for the fixing of the boundary line as follows:

> On the conclusion of the voting, the number of votes cast in each commune will be communicated by the Commission to the Principal Allied and Associated Powers, with a full report as to the taking of the vote and a recommendation as to the line which ought to be adopted as the frontier of Germany in Upper Silesia. In this recommendation regard will be paid to the wishes of the inhabitants as shown by the vote, and to the geographical and economic conditions of the locality.

The plebiscite took place on March 20, 1921, and the results were proclaimed on April 24; but the international commission failed to agree upon and therefore did not recommend a frontier line. The results of the plebiscite are thus summarized in a report of Viscount Ishii to the Council of the League of Nations:

> The results of the plebiscite in Upper Silesia were unfortunately not of a nature to allow the frontier line to be drawn according to the wishes of the population, nor did the economic and geographical conditions of the localities give any decisive indications to show how a line should be determined. Indeed, the fact that the two considerations had to be taken into account only complicated the situation.
>
> The plebiscite showed that, taking Upper Silesia as a whole, in certain districts toward the North and West, where the agricultural population is predominant, a great majority of the communes voted for Germany. In other districts, towards the South, where the inhabitants are chiefly of the agricultural and mining classes, the vote of the population was largely in favour of Poland. In an extensive territory in the Centre and East, the voting was of a very confused character. Here are to be found the metallurgical and chemical works and important deposits of coal, zinc and iron. The majority of the communes voted for Poland. Although in the big towns large major-

[3] Reply to the observations of the German delegation, Minutes, *ibid.*, p. 13.

ities were recorded for Germany, these towns are encircled by the Polish voting communes. It is to be noted that, although in a sense they form a network of their own, they are partly dependent for essential raw materials on outside districts. They are situated near the extreme Eastern limit of Upper Silesia, geographically distant from the bulk of the German voting communes, though the districts which separate them from these communes are not thickly populated.[4]

The report of the international commission was submitted to the Supreme Council, which appointed a committee of experts to undertake further investigations, but this committee was likewise unable to agree upon a frontier line. Its report is thus summarized by M. Briand in his note to Viscount Ishii above referred to:

> The Committee reached entire agreement as to the legal interpretation of the Treaty; it was therefore led to reject the solution which favoured the handing over of the territory in its entirety and which considered the results of the vote as a whole. It also gave general indications as to the degree of importance to be assigned to the geographical and economic conditions referred to in the Treaty. On the other hand, it did not succeed in reaching an agreement on a frontier line. In particular difference of opinion was revealed as to the right method of defining and describing the industrial and mining area of Upper Silesia, one delegation isolating in this area an "indivisible triangle" which could be separated from the southern part of the area, and which contained a German majority, another maintaining that the mining and industrial basin formed a single unit and that it was not possible to imagine the separate existence of the "industrial triangle."[5]

The Supreme Council, after fruitless efforts to settle the question by negotiation among its members on Aug. 12, 1921, invited the Council of the League of Nations to recommend the line which the Principal Allied and Associated Powers should lay down. The difficulty was submitted to the League in pursuance of Article 11, paragraph 2 of the Covenant, which declares it "to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends."

The Council accepted the invitation and, as above stated, on October 12, 1921, unanimously recommended the frontier line. The recommendation recited that the Council has made the weighty problem the subject of

[4]Minutes, *ibid.*, p. 9.

According to figures published in *Commerce Reports*, issued by the Bureau of Foreign and Domestic Commerce, Washington, D. C., Nov. 28, 1921, pp. 795 *et seq.*, in the whole plebiscite area 59.6 per cent. of the votes were cast for Germany and 40.4 per cent. for Poland. In the districts of the west and north five-sixths of the votes were for Germany; in the southern districts 70 per cent. of the votes were for Poland, while in the central and eastern area the vote was almost evenly divided, about 52 per cent. falling to Germany and 48 per cent. to Poland.

[5]Minutes, *ibid.*, p. 15.

long deliberations and thorough investigation and has endeavored to interpret faithfully and in an equitable spirit the provisions of the Treaty of Versailles with regard to Upper Silesia. "The Council, being convinced that its duty was above all to endeavour to find a solution in conformity with the wishes of the inhabitants, as expressed by the plebiscite, while taking into account the geographical and economic situation of the various districts, has been led to the conclusion that it is necessary to divide the industrial region of Upper Silesia." But, the Council continued, "owing to the geographical distribution of the population and the mixture of the racial elements, any division of this district must inevitably result in leaving relatively large minorities on both sides of the line and in separating important interests." In order, therefore, to guarantee the continuity of the economic life of the region during the period of readjustment, the Council formulated and recommended draft transitory provisions to be incorporated in a general convention between Germany and Poland relating to railways, water and electric power, monetary system, postal service, customs regime, coal and mine products, employers and workers federations, social insurance, and freedom of movement between the respective zones. It also formulated and recommended draft provisions for the protection of minorities.[6]

The plebiscite area embraces only about 4,100 square miles, with a population in 1919 of 2,060,000, but its rich coal and zinc deposits and highly developed iron and steel industries make the region of great economic importance. The decision of the Allies allots to Poland about 1,300 square miles, but this zone comprises 47 per cent. of the population, three-fourths of the coal production, all of the zinc mines and works, and half of the capacity of steel works. In this area about 510,000 votes were cast, of which about 285,000 were for Poland and 225,000 for Germany.

According to *Commerce Reports,* previously cited, from which these figures are taken, in 1913 the mines in Upper Silesia which are now assigned to Poland produced approximately 32,500,000 tons of coal, and those now assigned to Germany approximately 10,500,000 tons, the output for the whole area being valued at $75,000,000 annually. The total production of coal in Germany in the same year, excluding Alsace-Lorraine and the Saar Basin, was 174,000,000 tons, of which the production in the territory now assigned to Poland constituted 19 per cent. The pre-war production of coal in the present territory of Poland, exclusive of Upper Silesia, was about 9,000,000 tons, so that the production of Poland will be multiplied about four times by the decision. Since the pre-war consumption amounted to about 18,000,000 tons, it is evident that Poland will now have a considerable surplus of coal for exportation.

The production of pig iron in Upper Silesia in 1913 was 995,000 tons,

[6]Minutes, *ibid.*, p. 16.

valued at about $15,000,000 and representing about 6 per cent. of the aggregate production of Germany in its then existing boundaries. Approximately all of the iron ore mines lie in territory which has been allotted to Poland. Of the total number of blast furnaces in Upper Silesia immediately preceding the war, twenty-two were in territory now assigned to Poland and fourteen in that assigned to Germany. Of the eight principal iron and steel works, five are now in Polish territory. While the iron and steel production of the Upper Silesian territory which has passed to Poland constitute a comparatively small fraction of the total German output, it represents a very great increase in the Polish iron and steel industries, which, in 1913, had a production of 641,000 tons.

The output of raw zinc of Upper Silesia, amounting to nearly $20,000,000 per year, in 1912 was 168,600 tons, which represented about five-eighths of the total production of Germany, more than one-sixth of the world production, and was equal roughly to three-fifths of the production of the United States. The value of Upper Silesian production of lead with its by-products amounted before the war to nearly $3,500,000 per year. Practically the entire zinc and lead industry of Upper Silesia has passed to Poland.

But "while the decision thus allots to Poland decidedly more of the mineral wealth and of the manufacturing industries of Upper Silesia than remain with Germany, the latter retains the great bulk of the agricultural and forest land. Most of the seven-tenths of the plebiscite area allotted to Germany consists of excellent agricultural land or is occupied by valuable forests, which must be considered of great economic importance." In this territory about 675,000 votes were cast, of which about 480,000 were for Germany and 195,000 for Poland.

The new boundary starts at Oderberg in the south and follows the Oder River northwest to a point a little below the city of Ratibor. Thence it proceeds in an approximately straight line toward the northeast to the city of Beuthen, only a few miles from the former Polish border. Leaving that city to Germany, it turns northwest to a point west from the city of Lublinitz, where it turns again toward the northeast until it intersects the Polish border. It thus gives to Poland the southeastern part of the county of Ratibor, the great bulk of Rybnik, a small southeastern corner of the county of Tost-Gleiwitz, and the whole of the county of Pless. In the Industrial District Poland receives the southeastern half of Zabrze (less important industrially than the other half), the whole of Kattowitz, somewhat over half of the county of Beuthen, and the city-county of Königshütte. To the north of the Industrial Triangle, Poland receives much of the greater part of the county of Tarnowitz, a small corner of Tost-Gleiwitz and approximately two-thirds of Lublinitz, including the city of that name. Germany retains the counties of Leobschütz, Neustadt, Kosel, Oppeln, Kreuzburg, Gross Strehlitz, and Rosenburg, and most of Ratibor and Tost-Gleiwitz. The small northwestern section of Rybnik gives her a direct railroad line from Ratibor to Gleiwitz. She retains the industrial cities of Beuthen and Gleiwitz and the northwestern parts of the counties of Beuthen and Zabrze, all of which are of great economic importance.[7]

[7] *Commerce Reports, op. cit.*, p. 796.

The recommendations of the Council of the League of Nations as to the frontier and the general convention between Germany and Poland were approved on October 20 "by the Conference of Ambassadors, acting in the name and by special mandate of the British Empire, France, Italy and Japan, signatories together with the United States of America, as Principal Allied and Associated Powers, of the Treaty of Peace of Versailles," and transmitted on the same day by M. Briand as President of the Conference of Ambassadors, to the Ambassador of Germany and the Minister of Poland at Paris, with the statement that the treaty must be observed in its entirety, and in case either Germany or Poland should refuse to accept all or part of it or place obstacles in the way of its loyal execution, the Allied Powers reserve the right to take any measures to give full effect to their decision.

Pursuant to the recommendations of the Council, the Allied Powers directed the formation of a mixed commission of two Germans and two Poles, natives of Upper Silesia, with a president of some other nationality to be designated by the Council of the League of Nations, to supervise the execution of the transitory economic provisions to be incorporated in the treaty recommended by the Council, and the appointment of an arbitral tribunal to adjust differences of a private nature growing out of the settlement, this tribunal to be composed of three judges, one designated by Germany and one by Poland, and the president by the Council of the League of Nations. The Conference of Ambassadors further decreed that the aforementioned convention be negotiated by a German and Polish plenipotentiary under the presidency of a person to be designated by the Council of the League of Nations, who shall cast the deciding vote in case of disagreement between the parties, and the two governments were required to name their plenipotentiaries within eight days. The decree of the Allies further directed that the mixed commission above provided for be immediately constituted, to cooperate with the inter-Allied commission now administering the territory under the Treaty of Versailles, in the adoption of preparatory measures for the transition from the present state to the new régime.

The decision of the Allied Powers finally provided that as soon as they shall decide that the boundary commission provided for in the recommendation of the Council has sufficiently delimited the frontier on the spot and the general convention has been negotiated, the plebiscite commission shall give to the German and Polish Governments notification that they are free to take over the administration of the territories respectively allotted to them in accordance with Section 6 of the annex to Article 88 of the Treaty of Versailles.[8]

GEORGE A. FINCH.

[8] *L'Europe Nouvelle*, Oct. 29, 1921, pp. 1404-1408; and Monthly Summary of the League of Nations, Nov. 1921, p. 157.

## CURRENT NOTE

### AN ARBITRATION WITH NORWAY

A return to normalcy in the international world means a return to the judicial settlement of international disputes. Many events since the war testify to the fact that the trend of the times is in this direction, and it has been gratifying to observe that the United States, true to tradition, has been no disinterested bystander in the work of re-establishing the machinery of international law. It is quite proper that we should note with pride that the first president elected since the war to preside over an international tribunal constituted under the Hague Conventions was Mr. Elihu Root,[1] and especially that the plan for the Permanent Court of International Justice finally adopted by the League of Nations was very largely the work of this same distinguished American. But in rendering such services Mr. Root has been acting in a purely personal capacity, and while reflecting undoubted credit upon our country it is nevertheless a fact that his acts have not borne the stamp of official government sanction. Meanwhile abroad, and not a little at home, America's rejection of the League of Nations' Covenant has been the source of a certain scepticism or misunderstanding over the real position of America toward the world problem of reconciliation. To such criticisms our most valid appeal must be to the facts, and under this test events are again occurring which should convey to the world the assurance that the United States, both by word and in action, continues to look to the way of international arbitration as affording the surest road toward international understanding. Highly significant in this connection has been the recent reopening of the sessions of the British-American Claims Commission which, in pursuance of the treaty with Great Britain of August 18, 1910, had only commenced its work when the war suddenly interrupted its activities. And to this there may now be added an act carrying with it an even broader significance. An agreement between the United States and Norway[2] was signed on June 30, 1921, ratifications being exchanged at Washington on August 22, 1921, whereby the two countries have agreed to arbitrate certain important claims arising from the war.

According to the preamble to this agreement with Norway the purpose of the arbitration is "to settle amicably certain claims of Norwegian

[1] Case of the Expropriated Religious Properties in Portugal, Awards of Sept. 2-4, 1920.

[2] The treaty will be found printed in the Supplement to this JOURNAL, p. 16.

subjects against the United States arising, according to contentions of the Government of Norway, out of certain requisitions by the United States Shipping Board Emergency Fleet Corporation." The outstanding facts in the case may be briefly summarized; in a general way they are largely familiar to the public, in view of the many similar claims on the part of American citizens which have been referred to the Shipping Board and which are also being prosecuted before the Court of Claims. On August 3, 1917, the Shipping Board, pursuant to powers delegated under Act of Congress approved June 15, 1917, issued sweeping requisition orders to all shipbuilding yards of the country commandeering in the name of the Government all ships under construction having a capacity of over 2500 tons deadweight, and all materials pertaining thereto. American shipbuilders at that time were engaged in building many ships for foreign account, and the Norwegian claims which are the subject of the present arbitration grow out of contracts for the construction of fifteen ships, which by virtue of various assignments, some before and some after August 3, the date of the Government requisition, came eventually into the hands of Norwegian subjects. Nine of the fifteen vessels concerned were to be built in the yards of American companies whose stock was principally, if not entirely, owned by a Norwegian subject largely interested at the time in promoting shipbuilding construction in the United States, and these vessels were originally contracted for by other American companies which were also controlled by the same Norwegian subject. When the requisition became effective the keels of only two of these fifteen contracted ships had actually been laid in the yards, and a portion of the material delivered on one other. The Government took possession of the ships under construction, as well as of all material delivered on the contracts, and, the shipyards being henceforth held exclusively to government work by virtue of the war necessities of the United States, it became impossible for them to execute the contracts in which the Norwegian subjects were concerned.

The Act of June 15, 1917 had provided that the United States should pay "just compensation" in return for the requisitions made in pursuance thereof, and the Shipping Board became charged with the settlement of such claims. The Board was generally successful in concluding settlements but the case of the "Christiania Group of Norwegian Ship Owners" (the fifteen claimants in the present arbitration had combined under this title) proved an exception. This group sought to recover before the Board a total sum of $14,157,977.58, allegedly calculated upon the basis of original cost to the ultimate contract owners, plus additional expenses, plus interest. Such a method of calculation was entirely unacceptable to the Shipping Board. $2,381,635.00 had been paid to the builders as progress payments on these contracts, and, of course, to this sum a just claim might be established, but on the other hand the actual

material in the yards represented by these contracts (two ships under construction and part material delivered on one additional), and which was the only property acquired by the United States under the requisition, was estimated to be worth only $623,760.00. The amount claimed by the Norwegians stood at best for the highly speculative value that shipping contracts had obtained on the open market due to the shipping crisis prevailing under the pressure of the submarine warfare. The Norwegian claimants assert that they bought these contracts at great increases in price, and they contend that these high rates were justified under the abnormal circumstances.

Direct negotiations with the Shipping Board having proved fruitless, the matter was taken up diplomatically through the Norwegian Minister at Washington and the outcome was the decision to submit the claims to arbitration. The treaty provides for an Arbitral Tribunal to be constituted very much as prescribed by the Hague Convention of 1907 in the case of Summary Procedure. Each Government appoints one arbitrator and the third who is to preside over the Tribunal will be named by the President of the Swiss Confederation,—the two countries not having mutually come to a decision upon the third member when the first month elapsed as allowed by the treaty. The American and Norwegian members have already been announced. Mr. Chandler P. Anderson, well known to international law circles for his many previous services in international arbitrations, and particularly as Agent for the United States in the North Atlantic Coast Fisheries Arbitration at The Hague in 1910, as Counsel for the Government of Costa Rica in the Panama-Costa Rica Boundary Arbitration before Chief Justice White in 1913-14, and most recently as Arbitrator on the British-American Pecuniary Claims Arbitration Commission, has been named by the United States. Norway has likewise chosen an eminent representative of her country in the person of His Excellency Paul Benjamin Vogt, the present Ambassador of that country at the Court of St. James.

To act as Agent the United States has named Mr. William C. Dennis of Washington, formerly Assistant Solicitor of the Department of State, Agent of the United States in the Orinoco Steamship Company Arbitration at The Hague in 1910, and in the Chamizal Arbitration with Mexico at El Paso, Texas, in 1911. Mr. Dennis' latest public services in international law have been as Legal Adviser to the Chinese Government at Peking during the war, and as Solicitor to the American Delegation to the Preliminary Conference on International Communications held in Washington in the fall of 1920. The Norwegian Agent is Captain C. Frolich Hanssen, a distinguished artillery officer of the Royal Norwegian Army, and a practical expert both in the construction and operation of ships. Through long association in America with the shipping interests of the Norwegian claimants, and having represented these claimants before the

United States Shipping Board in 1919, and having served as a member of the Norwegian Technical Commission which participated in the negotiation of the Special Agreement of June 30, 1921, Captain Hanssen possesses an intimate knowledge of the matters involved in the arbitration.

According to the treaty the Tribunal would meet at The Hague June 22nd next, but by mutual agreement a postponement of one month has been adopted, thus fixing the opening date as July 22, 1922.

It is undoubted that an arbitration of such importance is destined to occasion much interest and publicity. The amount of money involved is enough to assure this. But apart from the pecuniary interests at stake there are several important legal questions awaiting decision which are likely to establish significant precedents in international law. This will be the first important arbitration to have direct bearing upon the war. By the treaty the Tribunal is to reach its decision "in accordance with the principles of law and equity." War was the cause, but normalcy returns again to appeal in the name of "law and equity."

STANLEY P. SMITH.

# CHRONICLE OF INTERNATIONAL EVENTS

## For the Period September 1—December 15, 1921.

(With references to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *Adv. of peace,* Advocate of peace; *Bundesbl.,* Switzerland, Bundesblatt; *Clunet,* Journal du droit international; *Cmd.,* Great Britain, Parliamentary papers; *Commerce Reports,* U. S. Commerce reports; *Cong. Rec.,* Congressional Record; *Contemp. R.,* Contemporary Review; *Costa Rica, Ga.,* La Gaceta; *Covenant,* The Covenant (London); *Cur. Hist.,* Current History (New York Times); *Daily digest,* Daily digest of reconstruction news; *D. G.,* Diario do Governo (Portugal); *D. O.,* Diario oficial (Brazil); *Deutsch. Reichs.,* Deutscher Reichsanzeiger; *E. G.,* Eidgenossiche gesetzblatt (Switzerland); *Edin. Rev.,* Edinburgh Review; *Evening Star* (Washington); *Figaro,* Le Figaro (Paris); *G. B. Treaty series,* Great Britain, Treaty series; *Ga. de Madrid,* Gaceta de Madrid; *G. U.,* Gazetta Ufficiale (Italy); *Guatemalteco,* El Guatemalteco; *I. L. O. B.,* International Labor Office Bulletin; *J. O.,* Journal officiel (France); *L. N. O. J.,* League of Nations, Official Journal; *L. N. T. S.,* League of Nations, Treaty series; *Lond. Ga.,* London Gazette; *Monit.,* Moniteur Belge; *Nation, (N. Y.); N. Y. Times,* New York Times; *Naval Inst. Proc.,* U. S. Naval Institute Proceedings; *P. A. U.,* Pan-American Union Bulletin; *Press Notice,* U. S. State Dept. Press Notice; *Proclamation,* U. S. State Dept. Proclamation; *Rev. int. de la Croix-Rouge,* Revue international de la Croix-Rouge; *Staats,* Netherlands Staatsblad; *Temps,* Le Temps (Paris); *Times,* The Times (London); *Wash. Post,* Washington Post.

*March, 1921.*

21 United States—Venezuela. Treaty for advancement of peace, signed at Caracas March 21, 1914, and ratified on Feb. 22, 1921, was proclaimed by President Harding. *U. S. Treaty series,* No. 652.

*May, 1921.*

27 *to Sept.* 10. Sweden—Switzerland. Agreement concerning insane persons effected by exchange of notes. Text: *E. G.,* Nov. 16, 1921, p. 789.

*June, 1921.*

25 Germany—Great Britain. Treaty signed in London, Dec. 31, 1920, for execution of section IV of article V of Treaty of Versailles, promulgated by Germany. Text: *Reichs. G.,* July 4, 1921, p. 777.

29 Allied Powers—Germany. Agreement concerning frontier lines in Saar Basin, signed at Paris, Dec. 16, 1920, promulgated by Germany. Text: *Reichs. G.,* July 12, 1921, p. 809.

*July, 1921.*

1 FRANCE—GREAT BRITAIN. Convention, signed July 1, 1861, relative to emigration of laborers from India to French colonies, denounced by Great Britain, effective Jan. 1, 1923. *Lond. Ga.*, Oct. 18, 1921, p. 8189.

8 GREAT BRITAIN—SWEDEN. Agreement signed at Stockholm relative to suppression of capitulations in Egypt. *G. B. Treaty series*, 1921, No. 14. Cmd. 1391.

12 FRANCE—GERMANY. Convention signed June 30, 1920, relative to war levies on Alsace-Lorraine, ratified by Germany. Text: *Reichs. G.*, July 12, 1921, p. 812. Ratifications exchanged July 23, 1921. *Reichs. G.*, Aug. 2, 1921, p. 958.

12 POLAND—ROUMANIA. Political agreement of March 3, 1921, ratified by Polish Diet. Text: *Temps*, July 22, 1921, p. 2.

19 GERMANY—POLAND. Treaty signed at Berlin, Feb. 12, 1921, supplementing treaty of Oct. 1, 1919, concerning interned persons, came into force. Text: *Reichs. G.*, July 19, 1921, p. 921.

20 BOLIVIA—GERMANY. Treaty signed at La Paz renewing friendly relations. *P. A. U.*, Dec., 1921, p. 625.

*August, 1921.*

1 BRAZIL—URUGUAY. Convention signed for promoting exchange of professors and students. *P. A. U.*, Nov., 1921, p. 511.

6 BELGIUM—GERMANY. Convention of July 9, 1920 relative to execution of art. 312 of Treaty of Versailles, promulgated in Germany. Text: *Reichs. G.*, Aug. 6, 1921, p. 1177.

6 DANZIG—GERMANY—POLAND. Convention signed at Paris, April 21, 1921, for freedom of transit through East Prussia, promulgated in Germany. *Reichs. G.*, Aug. 6, 1921, p. 1069.

8 BELGIUM—GREAT BRITAIN. Agreement, regarding mutual settlement of questions arising out of sequestration of property, came into force. Text: *Monit.*, Sept. 16 1921, p. 7742. *London Ga.*, Nov. 15, 1921, p. 9032.

13 AFGHANISTAN—SOVIET RUSSIA. Exchange of ratifications of treaty of Feb. 28, 1921 took place at Kabul. *Russian information*, Dec. 15, 1921, p. 137.

15 CHILE—SWEDEN. Arbitration treaty, ratified May 3, 1921, promulgated in Chile. *P. A. U.*, Jan., 1922, p. 86.

22-24 INTERNATIONAL CONGRESS AGAINST ALCOHOLISM. Sixteenth meeting held at Lausanne with 29 countries represented. *Mouvement pacifiste*, Aug.-Oct. 1921, p. 82.

24 NORWAY—UNITED STATES. Agreement for submission to arbitration of certain claims of Norwegian subjects, signed at Washington, June 30, 1921, proclaimed by President Harding. *U. S. Treaty series,* No. 654.

25 JAPAN—PARAGUAY. Ratifications of treaty of commerce signed at Asunción, Nov. 17, 1919, exchanged at Santiago. *P. A. U.,* Jan. 1922, p. 86.

25 *to Sept.* 15. PAN AMERICAN POSTAL CONGRESS. Held session in Buenos Aires, reaching agreements on parcel post, effective Jan. 1, 1923, and postal rates to Latin America. *N. Y. Times,* Sept. 12, 1921, p. 2, and Sept. 14, 1921, p. 32.

26 FAR EASTERN REPUBLIC—JAPAN. Negotiations began at Dairen in connection with evacuation of Japanese troops from the coast line and establishment of economic relations. *Russian information,* Dec. 15, 1921, p. 138.

27 FRANCE—GERMANY. Reparations agreement providing for payment in kind by Germany to France, signed at Wiesbaden. *Cur. Hist.,* Oct., 1921, *15*:154.

27 *to Sept.* 9. GREAT BRITAIN—GREECE. Agreement signed at Athens respecting British war graves in Greece. *G. B. Treaty series,* 1921, No. 24. Cmd. 1554.

30 GERMANY—SOVIET RUSSIA. Ratifications exchanged at Berlin of the supplementary agreement of May 6, 1921, for the exchange of prisoners of war and interned persons. *Reichs. G.,* Sept. 16, 1921, p. 1261.

30 *to Oct.* 12. LEAGUE OF NATIONS. COUNCIL. 14th regular meeting held in Geneva. During same period extraordinary sessions were held for discussion of Silesian question. *L. N. M. S.,* Nov., 1921, p. 149.

*September, 1921.*

1 ANGLO-HUNGARIAN MIXED ARBITRAL TRIBUNAL. Established in London. *Board of trade j.,* Sept. 8, 1921, p. 242.

1 INTERNATIONAL ZIONIST CONFERENCE. Opened at Carlsbad. *Evening Star,* Sept. 2, 1921, p. 12.

1-6 PAN AFRICAN CONGRESS. Biennial meeting held in Paris, continuing the meeting held in Brussels on Aug. 31. *N. Y. Times,* Sept. 6, 1921, p. 16; *Clunet,* May-Oct., 1921, p. 641.

1 SIAM—UNITED STATES. Commercial treaty of Dec. 16, 1920, ratified by Siam. *Wash. Post,* Sept. 4, 1921, II, 4

2 NORWAY—SOVIET RUSSIA. Preliminary trade agreement signed at Christiania. Text: *Soviet Russia,* Nov., 1921, p. 223.

3 INTERNATIONAL LAW ASSOCIATION. Closed 30th session at the Hague, after approving the "Hague Rules, 1921" governing maritime commerce, drawn up by its Maritime Law Committee. Text of Hague rules: *Rev. de droit int.*, 1921, ser. 3, *2*:471.

3 MEXICAN OIL QUESTION. Agreement reached between Mexican government and five American petroleum companies. *Wash. Post*, Sept. 5, 1921, p. 2; *Cur. Hist.*, Oct., 1921, *15*:170.

5 COSTA RICA—PANAMA. Panama evacuated disputed territory on Sept. 5, and Costa Rica took peaceful possession. *Cur. Hist.*, Oct., 1921, *15*:174.

5 *to Oct.* 6. LEAGUE OF NATIONS. ASSEMBLY. Second plenary conference held in Geneva. Agenda included disarmament problems, election of judges to Permanent Court of International Justice, amendments to covenant, international disputes, new members, finances, etc. *Cur. Hist.*, Nov., 1921, *15*:270.

7-27 GREAT BRITAIN—SOVIET RUSSIA. Curzon's note regarding alleged violation of trade agreement of March 16, 1921, sent to Soviet Foreign Office. Text (in part): *Times*, Sept. 21, 1921, p. 12. Litvinoff replied on Sept. 27. Summary: *Times*, Oct. 8, 1921, p. 7. Text: *Soviet Russia*, Dec., 1921, p. 261. Rejoinder sent on Nov. 12, to Litvinoff's note of Sept. 27. *Times*, Nov. 17, 1921, p. 9.

7 *to Oct.* 19. SHANTUNG QUESTION. Japan sent proposal to China on Sept. 7. China replied on Oct. 5. Text: *Europe*, Nov. 26, 1921, p. 1534. *Adv. of peace*, Oct., 1921, p. 339. Japan replied on Oct. 19. Text: *Europe*, Nov. 5, 1921, p. 1439.

8 FAR EASTERN REPUBLIC. Request for representation at Armaments conference transmitted to Secretary Hughes. Text: *Nation* (*N. Y.*), Oct. 26, 1921, p. 485.

9 FRANCE—GREECE. Treaty for execution of paragraph "f" of art. 296 of Treaty of Versailles, signed Aug. 27, 1921, promulgated in France. Text: *J. O.*, Sept. 15, 1921, p. 10646.

10 CENTRAL AMERICAN REPUBLIC. Constitution signed at Tegucigalpa, Honduras, by representatives of Guatemala, Honduras, and Salvador. *Cur. Hist.*, Oct., 1921, *15*:173; *Guatemalteco*, Sept. 29, 1921, No. 10, p. 61.

10-20 PAN AMERICAN STUDENTS CONFERENCE. Held in Guatemala City. *P. A. U.*, Jan., 1922, p. 57.

10 POLAND—SOVIET RUSSIA. Chicherin sent notes to Poland, on Sept. 10 and 22 protesting against Polish encouragement to Russian counter-revolution. Text: *Soviet Russia*, Nov., 1921, p. 212.

20 BRITISH—BULGARIAN MIXED ARBITRAL TRIBUNAL. Established in London. *London Ga.*, Sept. 20, 1921, p. 7383.

20 ECUADOR—VENEZUELA. Arbitration treaty, signed in Quito on May 22, 1921, ratified by Ecuador. *P. A. U.*, Jan., 1922, p. 86.

21 GREAT BRITAIN—SWEDEN. Agreement concluded by exchange of notes for reciprocal notification of particulars regarding lunatic nationals in each country. Text: *London Ga.*, Oct. 4, 1921, p. 7758.

21 INTERNATIONAL CONGRESS OF STUDENTS. Met at Mexico City. *P. A. U.*, Dec., 1921, p. 546.

22 BRAZIL—GREAT BRITAIN. Ratifications exchanged at Rio de Janeiro of agreement for exchange of money orders, signed March 1, 1921. *G. B. Treaty series*, 1921, No. 25. Cmd. 1562.

22 LEAGUE OF NATIONS. Latvia, Esthonia and Lithuania admitted to membership, bringing total membership to 51 nations. *N. Y. Times*, Sept. 23, 1921, p. 17.; *L. N. M. S.*, Nov., 1921, p. 121.

23 (?) DENMARK—NORWAY. Agreement regulating air traffic signed. *Times*, Sept. 26, 1921, p. 9.

24 INTERNATIONAL ASSOCIATION OF JOURNALISTS. Formed at Geneva, to defend and sustain the interests of its members in their relations with the League of Nations, and with the states, members of the League. *Clunet*, May-Oct., 1921, p. 645.

24 ITALY—SWITZERLAND. Agreement signed at Berne concerning the St. Gothard tunnel. French and German texts: *E. G.*, Oct. 12, 1921, p. 704.

26 *to Oct.* 13. CAUCASIAN REPUBLICS CONFERENCE. Opened at Kars on Sept. 26 with representatives from Georgia, Armenia, Azerbaijan, Russia, and Turkey. Closed on Oct. 18, after signing treaty regulating contentious questions between Turkey and the Caucasian Republics. *Russian information*, Dec. 15, 1921, p. 136.

26 FRANCE—NORWAY. Norway ratified treaty of commerce of April 23, 1921. *Temps*, Sept. 28, 1921, p. 1.

29 GREAT BRITAIN—PORTUGAL. Ratifications exchanged at Lisbon of treaty relating to capitulations in Egypt. *G. B. Treaty series*, 1921, No. 23, Cmd. 1553.

29 GREAT BRITAIN—PORTUGAL. Ratifications exchanged of treaty relating to extradition of fugitive criminals between the Federated Malay State and Portuguese territories. *G. B. Treaty series*, 1921, No. 21. Cmd. 1549.

29 GREAT BRITAIN—PORTUGAL. Ratifications exchanged at Lisbon of treaty relating to extradition of fugitive criminals between British protectorates and Portuguese territories. *G. B. Treaty series*, 1921, No. 22. Cmd. 1550.

29 LITHUANIA—SWEDEN. Sweden recognized the *de jure* government of Lithuania. *Cur. Hist.*, Nov., 1921, *15*:351.

30 BELGIUM—GREAT BRITAIN. Ratifications exchanged of convention relative to art. 296 of the Treaty of Versailles (enemy debts) signed at London, July 20, 1921. *G. B. Treaty series,* 1921, No. 19. Cmd. 1543. Promulgated in Belgium, Oct. 13, 1921. Text: *Monit.,* Nov. 10, 1921, p. 9994.

30 FRANCE—GREAT BRITAIN. Ratifications exchanged of convention relative to art. 296 of the Treaty of Versailles (enemy debts) signed at London, July 20, 1921. *G. B. Treaty ser.,* 1921, No. 18. Cmd. 1542.

30 WHITE SLAVE TRADE. Draft convention presented by Fifth Committee of League of Nations, approved by the Assembly. *L. N. M. S.,* Dec., 1921, p. 185.

*October, 1921.*

1 CENTRAL AMERICAN REPUBLIC. The constitution signed at Tegucigalpa on Sept. 9, 1921, became effective Oct. 1, 1921. *Commerce repts.,* Nov. 14, 1921, p. 652. Provisional Federal Council took charge of affairs at Tegucigalpa, the capital, on Oct. 10. *Cur. Hist.,* Nov., 1921, *15*:361.

1 HELIGOLAND. Inter-allied commission finished main work of demolition of ancient fortress. *Times,* Oct. 15, 1921, p. 10.

1 NORWAY—SOVIET RUSSIA. Commercial treaty, signed Sept. 2, 1921, ratified by Norway. *Temps,* Oct. 2, 1921, p. 1.

2 SOVIET RUSSIA—TURKEY. Ratification of peace treaty of Mar. 16, 1921 took place at Kars. *Temps,* Oct. 5, 1921, p. 2.

3-10 INSTITUTE OF INTERNATIONAL LAW. Meeting held in Rome. Grenoble, August, 1922, next meeting place. M. Andre Weiss of Institut de France named president. *Temps,* Oct. 12, 1921, p. 2. *R. de droit int.,* 1921, ser. 3, *2*:488.

3 ? NORWAY—POLAND. Commercial treaty concluded on the basis of the most-favored nation treatment. *Temps,* Oct. 6, 1921, p. 2.

4-9 PERMANENT MANDATES COMMISSION. Held first session in Geneva. *L. N. M. S.,* Nov., 1921, p. 158.

5 GREAT BRITAIN—UNITED STATES. Decision became effective to extend and apply to Hawaiian Islands the provisions of the convention signed at Washington, Mar. 2, 1899, relative to disposal of real and personal property. *Lond. Ga.,* Nov. 22, 1921, p. 9245.

5 POLAND—SOVIET RUSSIA. Agreement signed by which Russia will return to Poland certain art objects and other material belonging to Poland, and pay money due Poland under the treaty. *Temps,* Oct. 9, 1921, p. 2.

6 GERMANY—GREAT BRITAIN. Ratifications exchanged at London of amended agreement of Dec. 31, 1920 respecting art. 297 of Treaty of Versailles (property, rights and interests). *G. B. Treaty series,* 1921, No. 26. Cmd. 1563.

7 FRANCE—GERMANY. Supplementary reparations agreement signed at Wiesbaden. Text: *Europe,* Oct. 29, 1921, p. 1411.

8 AUSTRIA—UNITED STATES. Peace treaty signed at Vienna, Aug. 24, 1921, ratified by Austria. *U. S. Treaty series,* No. 659.

8 PHILIPPINE COMMISSION. Wood-Forbes report on political status of Philippine Islands sent to President Harding. Text: *Cur. Hist.,* Jan., 1922, *15*:678.

10 *to Nov.* 18. AALAND ISLANDS. Conference on neutralization and non-fortification of Islands met in Geneva on Oct. 10. *L. N. M. S.,* Nov., 1921, p. 163. Convention signed on Oct. 20, by representatives of Denmark, Esthonia, Finland, France, Germany, Great Britain, Italy, Latvia, Poland and Sweden. *Temps,* Oct. 23, 1921, p. 6. Text: *Europe,* Nov. 12, 1921, p. 1471. Convention ratified by Sweden, on Nov. 18. *L. N. M. S.,* Dec., 1921, p. 180.

10 PANAMA CANAL TOLLS. Senate passed bill exempting American coastwise vessels from tolls by vote of 47 to 37. *Cur. Hist.,* Nov., 1921, *15*:362; *Cong. Rec.,* Oct. 10, 1921, p. 6916.

11 FRANCE—PERU. Permanent Court of Arbitration decided that Peru should pay 25,000,000 francs in settlement of French claims. *N. Y. Times,* Oct. 12, 1921, p. 32.

12 SIAM—UNITED STATES. Treaty and protocol revising existing treaties signed at Washington, Dec. 16, 1920, proclaimed by President Harding. *U. S. Treaty series,* No. 655.

12-27 UPPER SILESIA. Award of League of Nations sent to M. Briand on Oct. 12. M. Briand forwarded it to Germany and Poland on Oct. 20. Text: *Europe,* Oct. 29, 1921, p. 1404. *Cur. Hist.,* Dec. 1921, *15*:501. Poland accepted decision on Oct. 25 and Germany on Oct. 26. *N. Y. Times,* Oct. 28, 1921, p. 10.

13 NAKHITCHEVAN. Newly created state placed under protection of Azerbaijan by treaty of Oct. 13, between Azerbaijan and Turkey. *Cur. Hist.,* Jan., 1922, *15*:665.

14 ?HUNGARY—RUMANIA. Agreement concluded for an exchange of political prisoners. *Temps,* Oct. 16, 1921, p. 2.

16 FINLAND—LITHUANIA. Finland recognized the government *de jure* of Lithuania. *Temps,* Oct. 17, 1921, p. 1.

17 AFGHANISTAN—PERSIA. Text of treaty of commerce and friendship made public at Teheran. *Temps,* Oct. 18, 1921, p. 4.

18 HUNGARY—UNITED STATES. United States Senate consented to ratification of Peace Treaty. *Cong. Rec.,* Oct. 18, 1921, p. 7195.

19 PORTUGAL. Revolution took place in Lisbon. *Cur. Hist.,* Dec., 1921, *15*:513.

20 *to Nov.* 18. FRANCE—TURKEY. Political and economic agreement signed at Angora. Text: Europe, Nov. 5, 1921, p. 1437. *Cur. Hist.*, Jan., 1922, *15*:661. Cmd. 1556. Ratified by Angora Assembly on Oct. 22. *Wash. Post*, Oct. 24, 1921, p. 5. Ratified by France on Oct. 30. *N. Y. Times*, Oct. 31, 1921, p. 17. *Temps*, Oct. 24, 1921, p. 2. Official statement issued by British Embassy in Paris on Nov. 6, regarding Angora agreement. *Times*, Nov. 12, 1921, p. 10. French reply to British note of Nov. 6 received in London on Nov. 18. Summary: *Times*, Nov. 19, 1921, p. 7.

21 ARGENTINA—GREAT BRITAIN. Great Britain denounced parcel post agreement of June 10, 1884, effective Feb. 17, 1922. *Lond. Ga.*, Oct. 21, 1921, p. 8291.

21 GREAT BRITAIN—UNITED STATES. Treaty signed enabling Canada to adhere to convention as to tenure and disposition of real and personal property, concluded between United States and Great Britain March 2, 1899. Text: *Cong. Rec.*, Nov. 9, 1921, p. 8460.

22 HUNGARY. Ex-emperor Charles made second attempt to regain throne, which resulted in his exile on Nov. 3 to the Island of Madeira. *Cur. Hist.*, Dec., 1921, *15*:509.

24 CHINA—SOVIET RUSSIA. Chinese consul in Moscow informed Soviet government that China was prepared to give formal recognition to the Russian trade delegation. *Russian information*, Dec. 15, 1921, p. 137.

24 ?CZECHOSLOVAK REPUBLIC—POLAND. A commercial treaty was signed at Warsaw based on the principle of the most-favored nation treatment. *Temps*, Oct., 26, 1921, p. 2.

25 DANZIG—POLAND. Treaty covering political and economic relations signed at Warsaw. *Times*, Oct. 27, 1921, p. 9. *L. N. M. S.*, Dec. 1921, p. 181.

25 FRANCO-HUNGARIAN MIXED ARBITRAL TRIBUNAL. Announced rules of procedure. *J. O.*, Oct. 30, 1921, p. 12222.

25 *to Nov.* 19. INTERNATIONAL LABOR CONFERENCE. Third annual session in Geneva resulted in 15 agreements for improvement of conditions of work, which took form in draft conventions or recommendations. Summary of conventions and recommendations: *Times*, Nov. 24, 1921, p. 9; *I. L. O. B.*, Nov. 2-Nov. 30, 1921.

28 BELGIUM—FRANCE. Convention relating to military service signed at Paris, Oct. 4, 1921, promulgated in France. Text: *J. O.*, Nov. 6, 1921, p. 12408.

28 GREAT BRITAIN—SOVIET RUSSIA. Note sent by Chicherin to British government on subject of Russia's foreign indebtedness. Text: *Europe*. Nov. 5, 1921, p. 1438. British reply, Nov. 1, 1921. Text: *Times*, Nov. 3, 1921, p. 9.

28 SOVIET RUSSIA. Renewed proposals of peace and cooperation to Great Britain, France, Italy, Japan and the United States and agreed to recognize, under certain conditions, the foreign debts of the Tsarist government prior to 1914. *N. Y. Times,* Oct. 30, 1921, p. 1. Text: *Soviet Russia,* Dec., 1921, p. 260.

29 ESTHONIA—FINLAND. A commercial treaty signed [at Helsingfors]. *Temps,* Oct. 31, 1921, p. 1.

30 GREAT BRITAIN—HUNGARY. Great Britain notified Hungary of revival from date of notice, of Treaty of Dec. 3, 1873 signed at Vienna, for mutual surrender of fugitive criminals, and Declaration signed at London, June 26, 1901 amending above treaty. *London Ga.,* Dec. 6, 1921, p. 9887.

31 CHINA—UNITED STATES. Note sent to Peking government by Secretary Hughes calling attention to China's financial obligations. *N. Y. Times,* Nov. 7, 1921, p. 1.

31 ECONOMIC CONFERENCE AT RIGA. Representatives of Finland, Esthonia, Latvia, Lithuania and Soviet Russia reached basis for agreements on transport questions. *Cur. Hist.,* Jan., 1922, *15*:674; *Times,* Nov. 5, 1921, p. 9.

31 PORTUGAL—UNITED STATES. Arbitration treaty signed at Lisbon, Sept. 14, 1920, proclaimed by President Harding. *U. S. Treaty series,* No. 656.

*November, 1921.*

4 ? DENMARK—NORWAY. Norway informed Denmark that it could not recognize extension of Danish sovereignty to the whole of Greenland, as announced by Danish Foreign office in May, 1921. *Times,* Nov. 5, 1921, p. 9.

4 SLAVE TRADE. Treaties of 1839 with Argentina, Uruguay and Venezuela denounced by Great Britain, effective from Aug. 13, 1921. *Lond. Ga.,* Nov. 4, 1921, p. 8719.

5 MONGOLIA—SOVIET RUSSIA. Treaty signed at Moscow forbidding the harboring of counter revolutionary activities, and including most-favored nation clauses. Summary: *Nation, N. Y.,* Jan. 4, 1922, p. 28.

6 CZECHOSLOVAK REPUBLIC—POLAND. Treaty signed [at Prague] settling questions of neutrality and making no territorial modification. *Temps,* Nov. 9, 1921, p. 2; Summary: *Times,* Nov. 11, 1921, p. 9; *Temps,* Nov. 12, 1921, p. 2.

7 CHINA—UNITED STATES. Tariff treaty of Oct. 20, 1920 proclaimed. *U. S. Treaty series,* No. 657.

8 AUSTRIA—UNITED STATES. Exchange of ratifications of peace treaty took place in Vienna. Proclaimed by President Harding Nov. 17, 1921. *U. S. Treaty series,* No. 659.

8 FRANCE—GREAT BRITAIN. Promulgation made by France of convention, signed at London, July 20, 1921, relative to art. 296 of Treaty of Versailles (enemy debts). Text of treaty: *J. O.,* Nov. 10, 1921, p. 12486.

10 CZECHOSLOVAK REPUBLIC—RUMANIA. Commercial treaty of April 23, 1921 came into force. *Bd. of trade j.,* Dec. 29, 1921, p. 682.

10 FRANCE—ITALY. French government denounced its commercial agreements with Italy, ending February, 1922. *Times,* Nov. 11, 1921, p. 9; *Commerce repts.,* Dec. 19, 1921, p. 981.

10 FRANCE—SPAIN. France cancelled *modus vivendi* of Dec. 30, 1893, under which certain Spanish products have enjoyed a special tariff since 1906. *Ga. de Madrid,* Nov. 13, 1921, p. 516; *Commerce repts.,* Dec. 19, 1921, p. 981.

11 GERMANY—UNITED STATES. Ratifications of peace treaty signed Aug. 25, 1921, exchanged in Berlin. Proclaimed by President Harding Nov. 14, 1921. *U. S. Treaty series,* No. 658.

12 CONFERENCE ON LIMITATION OF ARMAMENT. Opened in Washington Nov. 12 with delegations from the United States, Great Britain, France, Italy, Japan, China, Holland, Belgium and Portugal. President Harding made an address and Secretary Hughes presented American naval proposals. Text: *Cur. Hist.,* Dec., 1921, p. I.

15 CONFERENCE ON LIMITATION OF ARMAMENT. Held second plenary session for announcement of approval of American naval proposals by Great Britain, Japan, France and Italy. *Cur. Hist.,* Dec., 1921, p. XVIII.

15 INTERNATIONAL AERONAUTICAL CONGRESS. Opened at Paris, with 500 delegates in attendance. *Times,* Nov. 16, 1921, p. 13.

16 INTERNATIONAL SANITARY CONGRESS, PARIS. Adjourned after drafting convention providing that plague, yellow fever, cholera, small-pox and influenza epidemics be included among so-called international notifiable diseases. *Wash. Post,* Dec. 5, 1921, p. 6.

16-19 LEAGUE OF NATIONS. COUNCIL. 15th session held in Paris. *L. N. M. S.,* Dec., 1921, p. 167.

18 ALBANIA—SERB, CROAT, SLOVENE STATE. Resolution on boundary dispute adopted by Council of League at Paris, when representatives of the two nations, summoned before the Council, agreed to accept boundary decision of the Council of Ambassadors of Nov. 9, subject to certain reservations. *Cur. Hist.,* Dec., 1921, *15*:511; *L. N. M. S.,* Dec., 1921, p. 174.

18 GREAT BRITAIN—MESOPOTAMIA. Council of League of Nations notified of conclusion of treaty between new monarchy of King Feisal (Irak) and the British Empire. *Cur. Hist.*, Jan., 1922, *15*:674.

19 CZECHOSLOVAK REPUBLIC—SPAIN. Commercial agreement concluded by exchange of notes of Sept. 16, Oct. 26 and Nov. 19, 1921. Summary: *Board of trade j.*, Dec. 15, 1921, p. 633; *Ga. de Madrid*, Nov. 25, 1921, p. 642.

21 CONFERENCE ON LIMITATION OF ARMAMENT. Held third plenary session for discussion of attitude of France in respect to size of her army. Text of speeches: *Cur. Hist.*, Dec., 1921, p. XXXV.

22 AFGHANISTAN—GREAT BRITAIN. Treaty of friendship recognizing full independence of Afghanistan signed at Kabul. Summary: *Times*, Nov. 24, 1921, p. 10; *Cur. Hist.*, Jan., 1922, *15*:664.

24 JAPAN. Crown Prince Hirohito made regent in place of his father, Emperor Yoshihito. *Wash. Post*, Nov. 26, 1921, p. 1.

25 ITALY—TURKEY. Peace treaty signed at Angora. *Evening Star*, Nov. 28, 1921, p. 16.

*December, 1921.*

1 BARCELONA CONVENTIONS. Period closed for signature of conventions of transit and of navigable waterways (with protocol) and declaration recognizing right to a flag of states having no sea-coast. List of signatory members: *L. N. M. S.*, Dec., 1921, p. 170.

1 NORWAY—SPAIN. Provisional commercial agreement concluded by exchange of notes. *Bd. of trade j.*, Dec. 22, 1921, p. 663.

4 BULGARIA—UNITED STATES. Full diplomatic relations resumed. *Wash. Post*, Dec. 7, 1921, p. 6.

5 GERMANY—SWITZERLAND. Arbitration treaty signed for a period of ten years, which if not denounced within three months of date of expiration, will run for ten years more. *Temps*, Dec. 21, 1921, p. 2.

5 GUATEMALA. General Orellana elected provisional president to take place of Carlos Herrera. *N. Y. Times*, Dec. 10, 1921, p. 1.

6 GERMANY—PORTUGAL. Commercial agreement signed at Lisbon. *Bd. of trade j.*, Dec. 29, 1921, p. 682.

6 IRISH TREATY. Treaty signed at London by British Cabinet and conference delegates of the Irish Dail Eireann. Text: *N. Y. Times*, Dec. 7, 1921, p. 1; *Times*, Dec. 7, 1921, supplement; *Cur. Hist.*, Jan., 1922, *15*:568.

8 AUSTRIA—SOVIET RUSSIA. Political and commercial treaty signed at Vienna, *Wash. Post*, Dec. 9, 1921, p. 1; *Cur. Hist.*, Jan., 1922, *15*: 665.

10 CONFERENCE ON LIMITATION OF ARMAMENT. Held fourth plenary session for announcement of conclusion of four-power treaty between the United States, Great Britain, France and Italy. Text: *Cur. Hist.*, Dec., 1921, *15*:544.

10 NOBEL PEACE PRIZE, 1921. Awarded to M. Brantung, prime minister of Sweden, and M. Christian Lange, secretary-general of the Interparliamentary bureau, Geneva. *Times*, Dec. 12, 1921, p. 9.

12 HUNGARY—UNITED STATES. Peace treaty ratified by Hungary. *Cur. Hist.*, Jan., 1922, *15*:672.

12 JAPAN—UNITED STATES. Secretary Hughes announced that accord had been reached on Yap and other islands north of the equator held by Japan under League mandates. *N. Y. Times*, Dec. 13, 1921, p. 1.

13 FOUR POWER TREATY ON PACIFIC QUESTIONS. Signed by United States, Great Britain, France and Japan at Washington Conference on Limitation of Armaments. Text: *Cur. Hist.*, Dec., 1921, *15*:545.

13-14 TACNA—ARICA QUESTION. On Dec. 13 Chile invited Peru to hold plebiscite in provinces of Tacna and Arica. *Wash. Post*, Dec. 14, 1921, p. 1. Reply of Peru of Dec. 18 rejected plebiscite plan and proposed arbitration. *Wash. Post*, Dec. 20, 1921, p. 3.

14 CZECHOSLOVAK REPUBLIC—POLAND. Agreement for compulsory arbitration under Permanent court notified to League of Nations. *N. Y. Times*, Dec. 15, 1921, p. 5.

## INTERNATIONAL CONVENTIONS

AUSTRIAN PEACE TREATY. Saint Germain-en-Laye, Sept. 10, 1919.
*Ratification:*
Portugal, Oct. 15, 1921. *J. O.*, Nov. 29, 1921, p. 13078.

BULGARIAN PEACE TREATY. Neuilly, Nov. 27, 1919.
*Ratification:*
Japan, Oct. 31, 1921. *J. O.*, Nov. 27, 1921, p. 13030.

COPYRIGHT UNION. Revision, Berne, Nov. 13, 1908. Protocol, Berne, March 20, 1914.
*Adhesion:*
Brazil, Sept. 7, 1921. *Ga. de Madrid*, Sept. 8, 1921, p. 980.

COPYRIGHT UNION. Protocol, Berne, Mar. 20, 1914. Revision, Berlin, Nov. 13, 1908.
*Ratification:*
Belgium, Nov. 4, 1921. *E. G.*, Nov. 23, 1921, p. 824; *Ga. de Madrid*, Dec. 5, 1921, p. 781.

COPYRIGHT UNION. Revision, Berne, Nov. 13, 1908. Protocol, Berne, Mar. 20, 1914.

*Ratification:*

Liberia, May 31, 1920. *E. G.*, Oct. 5, 1921, p. 692; *Monit.*, Oct. 16, 1921, p. 9145.

CUSTOMS TARIFFS, Publication. Brussels, July 5, 1890.

*Adhesion:*

Esthonia, Oct. 7, 1921. *E. G.*, Oct. 26, 1921, p. 740. *Ga. de Madrid*, Nov. 2, 1921, p. 389.

Finland, Sept. 5, 1921. *E. G.*, Oct. 12, 1921, p. 703.

EIGHT HOUR DAY. Washington, Nov. 28, 1919.

*Ratification:*

Czechoslovak Republic, Apr. 30, 1921. *I. L. O. B.*, Sept. 7, 1921, p. 18.

India, Jan. 26, 1921. *I. L. O. B.*, July 20, 1921, p. 50.

EMPLOYMENT (FINDING) FOR SEAMEN. Genoa, July 10, 1920.

*Ratification:*

Norway, Nov. 16, 1921. *I. L. O. B.*, Nov. 30, 1921, p. 466.

Sweden, Sept. 12, 1921. *I. L. O. B.*, Oct. 26, 1921, p. 378.

EMPLOYMENT OF CHILDREN AT SEA. Genoa, July 9, 1920.

*Ratification:*

Sweden, Sept. 12, 1921. *I. L. O. B.*, Oct. 26, 1921, p. 377.

EMPLOYMENT OF CHILDREN IN INDUSTRY. Washington, Nov. 28, 1919.

*Ratification:*

Czechoslovak Republic, Apr. 30, 1921. *I. L. O. B.*, Sept. 7, 1921, p. 19.

GENEVA CONVENTION. Aug. 22, 1864. Revisions.

*Adhesion:*

Danzig, Oct. 6, 1921. *E. G.*, Nov. 2, 1921, p. 759; *Ga. de Madrid*, Nov. 2, 1921, p. 388.

Lithuania, Sept. 16, 1921. *Ga. de Madrid*, Sept. 24, 1921, p. 1226.

HUNGARIAN PEACE TREATY. Trianon, June 4, 1920.

*Ratification:*

Greece, Oct. 15, 1921. *J. O.*, Nov. 29, 1921, p. 13078.

Japan, Oct. 31, 1921. *J. O.*, Nov. 27, 1921, p. 13030.

Rumania, Sept. 10, 1921. *Temps*, Sept. 10, 1921, p. 4.

MOTOR VEHICLES, INTERNATIONAL CIRCULATION OF. Paris, Oct. 11, 1909.

*Adhesion:*

Danzig, Oct. 18, 1921. *E. G.*, Nov. 2, 1921, p. 760; *Ga. de Madrid*, Nov. 2, 1921, p. 388.

*Notification that treaty is binding:*

Austria, Aug. 1, 1921. *E. G.*, Nov. 30, 1921, p. 833; *Ga. de Madrid*, Nov. 27, 1921, p. 671.

NIGHT WORK OF WOMEN. Berne, Sept. 26, 1906.

*Adhesion:*

Danzig, Aug. 23, 1921. *E. G.*, Oct. 5, 1921, p. 691; *I. L. O. B.*, Nov. 9, 1921, p. 400.

*Notification that treaty is binding:*

Austria, July 25, 1921. *I. L. O. B.*, Aug. 31, 1921, p. 169.

NIGHT WORK OF WOMEN. Washington, Nov. 28, 1919.

*Ratification:*

Czechoslovak Republic, April 30, 1921. *I. L. O. B.*, Sept. 7, 1921, p. 19.

India, Jan. 26, 1921. *I. L. O. B.*, July 20, 1921, p. 51.

South Africa, Sept. 29, 1921. *I. L. O. B.*, Oct. 12, 1921, p. 332.

NIGHT WORK OF YOUNG PERSONS. Washington, Nov. 28, 1919.

*Ratification:*

India, Jan. 26, 1921. *I. L. O. B.*, July 20, 1921, p. 51.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Protocol of signature. Geneva, Dec. 16, 1920.

*Judges elected:* Sept. 14-15, 1921.

*Names of judges:*

MM. Altamira (Spain), Anzilotti (Italy), Barboza (Brazil), De-Bustamante (Cuba), Lord Finlay (Great Britain), MM. Huber (Switzerland), Loder (Netherlands), Moore (U. S.), Nyholm (Denmark), Oda (Japan), Weiss (France).

*Deputy judges:*

MM. Beichmann (Norway), Negulesco (Roumania), Wang (China), Yovanovitch (Yugo-Slavia). *L. N. M. S.*, Oct., 1921, p. 109.

*Ratification:*

Belgium, Aug. 17, 1921. *Monit.*, Sept. 23, 1921, p. 8042.

PERMANENT COURT OF INTERNATIONAL JUSTICE. Optional clause, Geneva, Dec. 16, 1920.

*Signatures:*

Haiti, Lithuania, Norway, Panama, Oct., 1921. *L. N. M. S.*, Nov., 1921, p. 158.

PHYLLOXERIC CONVENTION. Berne, Nov. 3, 1881. Supplement, Berne, Apr. 15, 1889.

*Adhesion:*

Austria, July 25, 1921. *Ga. de Madrid*, Sept. 13, 1921, p. 1035.

POSTAL CONVENTION. Madrid, Nov. 13, 1920.

*Adhesion:*

Danzig, Aug. 22, 1921. *E. G.*, Nov. 2, 1921, p. 758.

Lithuania, Aug. 29, 1921. *Ga. de Madrid*, Oct. 26, 1921, p. 288.

*Promulgation:*

Spain, Nov. 19, 1921. *Ga. de Madrid,* Nov. 23, 1921, p. 630. *Commerce repts.,* Jan. 16, 1922, p. 156.

*Ratification:*

All signatories, Dec. 1, 1921. *Times,* Dec. 2, 1921, p. 9.

PROTECTION OF BIRDS USEFUL TO AGRICULTURE. Paris, Mar. 19, 1902.

*Notification that treaty is binding:*

Austria, Aug. 1, 1921. *Ga. de Madrid,* Dec. 17, 1921, p. 933.

PROTECTION OF INDUSTRIAL PROPERTY. Paris, Mar. 20, 1883. Revision, Brussels, Dec. 14, 1900; Washington, June 2, 1911.

*Adhesion:*

Danzig, Oct. 5-6, 1921. *E. G.,* Oct. 26, 1921, p. 738; *Monit.,* Nov. 13, 1921, p. 10145.

Finland, Aug. 2, 1921. *Reichs. G.,* Sept. 23, 1921, No. 96, p. 1264.

PROTECTION OF INDUSTRIAL PROPERTY (affected by world war). Berne, June 30, 1920.

*Adhesion:*

Danzig, Oct. 5-6, 1921. *E. G.,* Oct. 26, 1921, p. 738.

*Ratification:*

Portugal, Aug. 24, 1921. *Ga. de Madrid,* Sept. 16, 1921, p. 1081.

RADIOTELEGRAPH CONVENTION. London, July 5, 1912. Service Regulations, London, 1912.

*Adhesion:*

Austria, Oct. 19, 1921.

New Hebrides, *Monit.,* Dec. 7, 1921, p. 11087.

Danzig.

Poland (with reservations), *Monit.,* Nov. 23, 1921, p. 10535.

Venezuela, June 16, 1921. *Ga. oficial* (*Venezuela*) Extra number, Nov. 29, 1921, p. 1.

REFRIGERATION, INTERNATIONAL INSTITUTE OF. Paris, June 21, 1920.

*Ratification:*

Belgium, Finland, Italy, Monaco, Norway, Serb, Croat, Slovene State, Oct. 17, 1921. *J. O.,* Dec. 1, 1921, p. 13134.

REPRESSION OF OBSCENE PUBLICATIONS. Paris, May 4, 1910.

*Adhesion:*

Czechoslovak Republic, May 16, 1921. *J. O.,* Nov. 27, 1921, p. 13030.

SANITARY CONVENTION. Paris, Jan. 17, 1912.

*Ratification:*

Guatemala, Nov. 10, 1921. *J. O.,* Dec. 29, 1921, p. 14190.

Uruguay, July 18, 1921. *E. G.,* Nov. 23, 1921, p. 804; *Ga. de Madrid,* Nov. 13, 1921, p. 516.

SUBMARINE CABLES. Paris, Mar. 14, 1884. Declarations, Dec. 1, 1887. Protocol, July 7, 1887.

*Notification that treaty is binding:*

Austria, Dec. 3, 1921. *Ga. de Madrid,* Dec. 14, 1921, p. 909.

TELEGRAPH. St. Petersburg, July 22, 1875.

*Adhesion:*

China, Aug. 31, 1921. *E. G.,* Oct. 5, 1921, p. 691; *Monit.,* Nov. 23, 1921, p. 10535.

TRADE-MARKS REGISTRATION. Madrid, Apr. 14, 1891. Revision, Washington, June 2, 1911.

*Adhesion:*

Czechoslovak Republic, Aug. 16, 1921. *E. G.,* Oct. 5, 1921, p. 690.

UNEMPLOYMENT CONVENTION. Washington, Nov. 28, 1919.

*Ratification:*

Denmark, Sept. 24, 1921.

Finland, Oct. 19, 1921. *I. L. O. B.,* Nov. 2, 1921, pp. 392 and 394.

India, Jan. 26, 1921. *I. L. O. B.,* July 20, 1921, p. 50.

Sweden, Sept. 12, 1921. *I. L. O. B.,* Oct. 26, 1921, p. 377.

UNIVERSAL POSTAL UNION. Rome, May 26, 1906.

*Adhesion:*

Danzig, Aug. 22, 1921. *E. G.,* Nov. 2, 1921, p. 758.

Lithuania, Aug. 29, 1921. *Ga. de Madrid,* Oct. 26, 1921, p. 288.

WEIGHTS AND MEASURES. Paris, May 20, 1875.

*Promulgation:*

Austria, Aug. 1, 1921. *E. G.,* Oct. 19, 1921, p. 724.

WHITE SLAVE TRADE. Paris, May 18, 1904.

*Adhesion:*

Czechoslovak Republic, May 17, 1921. *J. O.,* Nov. 27, 1921, p. 13030. *Ga. de Madrid,* Dec. 18, 1921, p. 938.

WHITE PHOSPHORUS IN MATCHES. Berne, Sept. 26, 1906.

*Adhesion:*

Austria, July 25, 1921. *I. L. O. B.,* Aug. 31, 1921, p. 170.

Danzig, Aug. 23, 1921. *E. G.,* Oct. 5, 1921, p. 692; *Ga. de Madrid,* Sept. 26, 1921, p. 1250.

Finland, Oct. 13, 1921. *I. L. O. B.,* Nov. 16, 1921, p. 17; *E. G.,* Nov. 23, 1921, p. 818.

Japan, Oct. 14, 1921. *I. L. O. B.,* Nov. 9, 1921, p. 408; *E. G.,* Nov. 2, 1921, p. 760.

Rumania, July 21, 1921. *Reichs. G.,* Sept. 9, 1921, p. 1255.

WHITE SLAVE TRADE. Paris, May 4, 1910.

*Adhesion:*

Czechoslovak Republic, May 17, 1921. *J. O.,* Nov. 27, 1921, p. 13030; *Ga. de Madrid,* Dec. 18, 1921, p. 938.

M. ALICE MATTHEWS.

## PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

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———. Between British Empire and Hungary constituted under Art. 239 of Treaty of Trianon. Rules of procedure, Aug. 18, 1921. (S. R. & O., 1921, 1422.) 7d.

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Patents, designs, and trade-marks. Order in Council applying Sec. 91 of the Act of 1907 to Bulgaria. July 14, 1921. (S. R. & O., 1921, 1213.) 2d.

Patents of Hungarian nationals vested in Custodian. Order of Board of Trade as to "vested patents," "vested applications," and "restored patents." Aug. 16, 1921. (S. R. & O., 1921, 1315.) 3d.

Patents. Treaty of Peace (Hungary, patents) Rules, Sept. 5, 1921. (S. R. & O., 1921, 1453.) 2d.

Peace Handbooks prepared under direction of Historical Section. Foreign Office. Vol. XVIII. German possessions in Africa. (Cloth ed.) 13s.

Petroleum situation. Despatch to Ambassador at Washington enclosing a memorandum on the. (Misc., 1921, No. 17.) 2d.

Russia-Great Britain trade agreement. Correspondence between H. M. Government and the French Government respecting. (Russia, 1921, No. 2.) 4½d.

Tanganyika Territory. Report on, covering the period from the conclusion of the armistice to the end of 1920. (Cmd. 1428.) 1s. 8d.

Thrace, Treaty between the Allied Powers and Greece relative to, signed at Sévres, Aug. 10, 1920. (Treaty series, 1921, No. 13.) 2d.

Trading with the Enemy Order, 1921. Custodian direction. (S. R. & O., 1921, 1405.) 2d.

Treaty of Peace (Hungary) Order, 1921. (S. R. & O., 1921, 1285.) 9½d.

———. Egypt Order in Council, Aug. 10, 1921. (S. R. & O., 1921, 1401.) 2d.

Turkey, Reports on atrocities in certain districts of. (Turkey, 1921, No. 1.) 3d.

War, Order in Council declaring date of termination of. Aug. 10, 1921. (S. R. & O., 1921, 1276.) 2d.

War with Hungary, Order in Council determining date of termination of. Aug. 10, 1921. (S. R. & O., 1921, 1284.) 2d.

## UNITED STATES[2]

Cables, submarine. Executive order directing that Secretary of State shall receive all applications for licenses to land or operate. July 9, 1921. 1 p. (No. 3513.) *State Dept.*

China. Report to accompany bill (H. R. 8221) for relief of. Aug. 23, 1921. 5 p. (H. rp. 381.) *Claims Committee.*

Chinese Indemnity. Report to accompany S. J. Res. 85 for remission of further payments of annual installments. Aug. 10, 1921. 5 p. (S. rp. 250.) *Foreign Relations Committee.*

Colorado River. Act to permit compact or agreement between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the distribution and apportionment of waters of Colorado River. Approved Aug. 19, 1921. 1 p. (Public 56.) 5c.

Consular officers, notarial manual for. 1921. 84 p. Cloth, 40c.

Extradition. Memorandum relative to applications for extradition from foreign countries of fugitives from justice. 1921. 3 p. *State Dept.*

Foreign exchange. Hearings on H. R. 8404 to investigate international exchange problem for purpose of determining means which may best be employed for stabilization of exchange. Oct. 8, 1921. Statement by H. N. Lawrie. 51 p. 10 pl. *Banking and Currency Committee.*

Foreign loans. Hearings on H. R. 7359 to enable refunding of obligations of foreign governments owing to United States. Oct. 6, 1921. 23 p. *Ways and Means Committee.*

———. Report to accompany H. R. 8762 to create commission authorized to refund or convert obligations of foreign governments owing to

[2]Where prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

United States. Oct. 20, 1921. 10 p. (H. rp. 421.) *Ways and Means Committee.*

Foreign Relations of United States. List of publications for sale by Superintendent of Documents. Sept., 1921. 42 p. (Price list 65, 5th ed.) *Govt. Printing Office.*

Germany. Treaty of peace with Germany, Aug. 25, 1921, together with Sec. 1 of Pt. 4 and Pts. 5, 6, 8-12, 14 and 15 of Treaty of Versailles under which the United States claims rights and privileges. 123 p. (S. doc. 70.) *Senate.*

Haiti, Inquiry into occupation and administration of, and Santo Domingo. Hearing, Aug. 5, 1921. Pt. 1, 104 p. *Select Committee.*

Immigration laws, rules of May 1, 1917. 6th ed. Sept., 1921. 119 p. map. Paper, 10c.

———. Information relative to immigration laws and their enforcement in connection with admission of aliens. 1921. 4 p. *Immigration Bureau.*

Japanese immigration and colonization. Skeleton brief by V. S. McClatchy, representative of Japanese Exclusion League of California, filed with Secretary of State. 1921. 143 p. (S. doc. 55.) *Senate.*

Liberia, proposed loan to. (S. doc. 58.) Aug. 1, 1921. 3 p. *State Dept.*

Naturalization laws and regulations. Sept. 24, 1920. Reprint, 1921. 45 p. Paper, 5c.

New York harbor. S. J. Res. 88, joint resolution granting consent of Congress to agreement or compact entered into between State of New York and State of New Jersey for creation of Port of New York District and establishment of Port of New York Authority for comprehensive development of port. Approved Aug. 23, 1921. 8 p. (Pub. res. 17.) 5c.

Norway, Agreement between United States and, for submission to arbitration of certain claims of Norwegian subjects. June 30, 1921. 5 p. (Treaty series 654.) *State Dept.*

Panama Canal, Canal Zone, Republic of Panama, Colombia treaty, and Nicaragua. Publications for sale by Superintendent of Documents. Sept., 1921. 8 p. (Price list 61, 6th ed.) *Govt. Printing Office.*

Pan American Financial Conference. Committees appointed by Secretary of Treasury to carry out recommendations of. 1921. 15 p. *Inter-American High Commission.*

Passports. Executive order amending order of Aug. 8, 1918, concerning entry of aliens into Panama Canal Zone. Oct. 18, 1921. 1 p. (No. 3562.) *State Dept.*

———. Executive order amending order of Aug. 8, 1918, concerning entry of aliens into United States in transit for foreign destination. Sept. 29, 1921. 1 p. (No. 3555.) *State Dept.*

Passports. Notice concerning use of. Aug. 1, 1921. 2 p. *State Dept.*

Russia. Political and economic report of British Committee to Collect Information on Russia, presented to Parliament. 1921. 217 p. (S. doc. 50.) *Senate.*

St. Mary River. Reargument in matter of measurement and apportionment of waters of St. Mary and Milk Rivers and their tributaries under Art. 6 of treaty of Jan. 11, 1909, between United States and Canada. May 3-5, 1920. 200 p. *International Joint Commission on Boundary Waters between United States and Canada.*

Treaties. Compilation of treaties between United States and certain foreign Powers with amendments, modifications, or reservations adopted by Senate and action of foreign governments thereon. 1921. 317 p. (S. doc. 72.) *Senate.*

War munitions. Report to accompany S. H. Res. 124 to amend S. J. Res. 89, approved March 14, 1912, so that the President may limit export of arms or munitions of war to any country in which United States exercises extraterritorial jurisdiction and in which domestic violence exists. Oct. 17, 1921. 2 p. (S. rp. 299.) *Foreign Relations Committee.*

GEORGE A. FINCH.

# JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

## AMERICAN AND BRITISH CLAIMS ARBITRATION TRIBUNAL[1]

[Arbitrators: M. Henri Fromageot, Sir Charles Fitzpatrick, Hon. Chandler P. Anderson]

### IN THE MATTER OF THE ARGONAUT AND COLONEL JONAS H. FRENCH

### CLAIMS NOS. 14 AND 15

*Decision rendered December 2, 1921*

**The Government of the United States claims from the Government of His Britannic Majesty, on account of the wrongful seizure and confiscation of some boats and seines of the American vessels *Argonaut* and *Colonel Jonas H. French*, and the consequent loss to the owners of such vessels by reason of such seizures and the threatened seizure of the vessels, the sum of $46,655.75 with interest, being $24,600 on account of the *Argonaut*, and $22,055.75 on account of the *Colonel Jonas H. French*.**

On the 24th of July, 1887, the *Argonaut* and *Colonel Jonas H. French*, two American schooners, duly registered and licensed at Gloucester, Massachusetts, United States, were fishing for mackerel southward of East Point, Prince Edward Island, Dominion of Canada, in the vicinity of the Canadian Government Cutter *Critic* and some other American fishing vessels.

In the afternoon of that day, the *Argonaut* being off West River, discovered a school of mackerel and sent one of her boats with a seine to catch them.

It is shown by the affidavits sworn on August 5 and 12, 1887 by the owner, the master and men of the *Argonaut* (United States Memorial, Exhibits 7, 8, 9) that the seine was set and enclosed the mackerel at a distance of about four miles from shore (United States Memorial, Exhibit 7), and also that there was at that time an ebb tide running eastward at the rate of about three miles an hour (*ibid.*).

It appears that the seine being fouled, about one hour elapsed before it was pursed up and the fish secured (United States Memorial, Exhibit 8), and during that time the aforesaid ebb tide set the boat and seine towards the shore quite rapidly (United States Memorial, Exhibit 7). In order to

[1]Previous decisions of the Tribunal are printed in this JOURNAL, Vol. 13, pp. 875-890; Vol. 14, pp. 650-66; Vol. 15, pp. 292-304.

avoid difficulties with the Canadian Cutter, the seine was taken up into the boat and the fish turned out alive.

At that time the Canadian Cutter was about a mile away from the boat. The master of the *Argonaut* went to the *Critic* and asked if they considered the seine and boat within three miles of the shore, informing the captain that the tide had swept them from a position fully a mile outside. The captain of the *Critic* replied that the boat and seine were only two miles off shore. Notwithstanding the explanation of the master of the *Argonaut* that if the seine was inside the limit it was entirely without design on his part but the result of the tide taking it in, the seine and boat were seized and twelve men arrested.

About the same time and place, the schooner *Colonel Jonas H. French* was lying about three and a half miles off shore when she saw mackerel outside of her about a mile (United States Memorial, Exhibit 14). Two boats went with their seines, which were set around the fish, and one of the boats with two men in it were left in charge of the seine with the mackerel enclosed. These men soon found that they were drifting rapidly with the tide along the shore and also toward the shore, and they had no anchor or other means of preventing the boat and seine from going with the tide (United States Memorial, Exhibit 15). Finding that they must inevitably drift inside the three-mile limit, they endeavored to take in the seine, and, while doing so, were arrested by the Cutter *Critic*. About three-quarters of an hour had elapsed from the time the boat was left as aforesaid until the seizure (United States Memorial, Exhibit 15).

On July 29, 1887, two brief printed circulars were addressed by the captain of the *Critic* to the United States Consul General at Halifax, Nova Scotia, stating the fact of the seizures "for violation of the statutes in force in Canada, relating to foreign fishing vessels" (United States Memorial, Exhibit 2).

Immediately after the seizure of their boats and seines and the arrest of their men, the masters of the *Argonaut* and the *Colonel Jonas H. French* abandoned their fishing trip and returned to their home port in the United States. While returning they heard that it was the intention of the Canadian authorities to seize the schooners themselves wherever they could be found outside the territorial waters of the United States (United States Memorial, Exhibits 3, 4, 10).

On September 19, 1887, proceedings were begun in the Vice-Admiralty Court of Prince Edward Island for the forfeiture of the boats and seines, and on March 6, 1888, two decisions *ex parte* were rendered condemning the same to be forfeited for having been found to be fishing and to have been fishing and preparing to fish in the Canadian waters within three miles of the shore. (British Answer, Annexes 57, 58.)

It is shown by the documents that the owners, although opportunity was given to them to make the necessary application to the Vice-Admiralty

Court, did not exercise their right to have the cases reopened and to put in their defence before the court. (United States Memorial, Exhibits 25, 26.)

It does not appear that there was any diplomatic correspondence relating to these cases before they were submitted to this arbitration.

*In law:*

By article 1 of the Treaty concluded at London, October 20, 1818, between the United States and Great Britain, it was stipulated that, except in certain localities, without interest in this case, the United States renounced

> forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above mentioned limits; Provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever.

By the Imperial Statute 59, George III, Chapter 38 (1819), article II, it is prohibited to any foreigner in a foreign vessel to fish for or to take any fish within the three-mile limit of the Canadian coast, and by the Revised Statutes of Canada, 1856, chapter 94, sections 1, 2, 3 and 7, certain penalties and the forfeiture of the vessel, and the legal prosecutions are provided for in case of contravention.

It is a universally recognized principle of international law that a State has jurisdiction over sea-fishing within its territorial waters, and to apply thereto its municipal law, and to impose in respect thereof such prohibitions as it may think fit. The Treaty of 1818 did not make any exception in regard to the inhabitants of the United States in these waters.

The only question then to be decided in this case is whether or not the boats and seines of the *Argonaut* and *French* were within the three-mile limit.

It is to be noted that, though the Canadian regulations required them to be made (see *David J. Adams'* case, United States Memorial, p. 358), no official statement of the circumstances of the alleged offences or of the legal provisions alleged to be contravened, no document drawn up by the officers who carried out the seizures proving the alleged illegal position of the boats and seines, or reporting any bearings or soundings taken at the time, are presented by the British Government in justification of the action of their naval authorities. The log book of the Cutter *Critic* is not even produced. The only documents presented are the two brief reports, above referred to, stating the fact of the seizures for violation of the statutes in force in Canada, relating to foreign fishing vessels. This is insufficient proof of the legality of the seizures.

However, according to article 5, paragraph 4, of the Special Agreement, this Tribunal is to decide all claims submitted upon such evidence or information as may be furnished by either Government.

In regard to the *Argonaut*, it results from the affidavits of the owner, master and men, produced by the United States (United States Memorial, Exhibits 7, 8) and above referred to, that, first, the boat and seine were set at four miles off shore; second, that they remained out for about one hour and were drifting shoreward with the tide; and third, that the tide was running to the eastward at from two and a half to three miles an hour.

In his protest, the owner does not contest so much the position of the boat and seine within the three-mile limit as the alleged act of fishing to which the Canadian law was applied; nor does the United States Consul General, when reporting to the Assistant Secretary of State on August 7, 1887, the statements of the men, deny that the boats were seized within the three-mile limit (United States Memorial, Exhibit 2).

In regard to the boat and seine of the *Colonel Jonas H. French*, the sworn affidavits of the owner, master and men, produced by the United States (United States Memorial, Exhibits 14 and 15) show, first, that the vessel was three and a half miles from the shore; second, that the mackerel were one mile outside the vessel, so that the boat and seine were four and a half miles from the shore when the seine was set out; and third, that they delayed about three-quarters of an hour, being swept shoreward by the ebb tide, when they were seized.

It must be observed that though the intention was to fish quite near the three-mile limit and though with the exercise of a very small amount of prudence it could have been foreseen that there would be a strong tide setting shorewards, there was on board the boat no anchor or any other means of preventing it drifting within the prohibited zone.

On all the facts presented in these cases, this Tribunal finds that the boats and seines of both vessels were less than three miles from the shore when seized.

The boats and seines of the two vessels being inside the territorial waters, were, from the international law point of view, undoubtedly subject to the municipal law and the jurisdiction of Canada, and the question whether or not, under the circumstances of these cases, taking into consideration the good faith of the fishermen and the exact character of their acts, a proper interpretation and application of the Canadian law was made by the Canadian court is a question of municipal law and not a question of international law to be decided by this Tribunal, so far as these cases stand.

In regard to the contended intention of the Canadian authorities, to seize the two schooners themselves, that mere intention, even if any such existed, cannot by itself be the basis for indemnity unless it was actually

manifested by some wrongful act, and, in that respect, no sufficient evidence is offered to establish any order of seizure given, or any other measure of execution taken against the two vessels.

FOR THESE REASONS:

This Tribunal decides that the claims be dismissed.

The President of the Tribunal,

(Signed) HENRI FROMAGEOT.

## IN THE MATTER OF THE SIDRA

### CLAIM NO. 23

*Decision rendered November 29, 1921*

This is a claim presented by His Britannic Majesty's Government for £4,336/7/4 and £1,127 interest for damages on account of a collision which occurred during a dense fog in the Patapsco River in the approaches of Baltimore Harbor, Maryland, in the territorial waters of the United States on the 31st of October, 1905, between the United States Government tug boat *Potomac* and the British merchant ship *Sidra*.

It appears from her certificate of registry that the *Sidra*, a steamscrew vessel, was in 1905 a British ship of 5,400 tons displacement, 322 feet long and drawing 10 to 12 feet.

The *Potomac* was a steamscrew tug boat owned by the United States Government; she was 135 feet in length with a draft of about 15 feet; her displacement was 650 tons.

On October 31, 1905, at 6 o'clock in the morning, the *Sidra* bound from New York to Baltimore was proceeding up the channel to Baltimore harbor; the pilot and the captain were on the bridge, a seaman was at the wheel, the chief officer and carpenter were stationed on the forward deck by the anchor, which was ready to let go.

At about 7:30 a. m. soon after passing Fort Carroll, the weather became foggy, and the fog became so thick that at 7:45 in the judgment of pilot it was prudent to anchor. The exact position of the vessel, when anchored, is contested.

Immediately upon anchoring, the *Sidra* rang her bell in conformity with the Inland Rules of the United States, article 15, and thereafter hearing the fog-blasts of an approaching steamer, which proved to be the *Potomac*, she continued to ring her bell.

On the same day, October 31, 1905, at about 6 a.m., the United States tug boat *Potomac* had left Annapolis, under orders to proceed to Baltimore to obtain provisions for the North Atlantic fleet and to return to Annapolis on the afternoon of that same day (United States Answer, Exhibit 6). The commanding officer was on the bridge and with him a Government

licensed pilot and the boatswain as lookout. She had no lookout on the forecastle.

At about 8 o'clock in the morning the *Potomac* passed Fort Carroll and proceeded up the river on the starboard side of the channel heading up; at that time the weather was still clear (United States Answer, p. 44), but about ten minutes later it suddenly changed and a dense fog shut in upon the water.

Before the fog shut down, the *Potomac* sighted a steamer under way about two miles ahead in the channel, and, according to the commanding officer, she was the *Sidra* (United States Answer, p. 18).

As soon as the fog shut in, the *Potomac* slowed gradually until going 4 knots (United States Answer, p. 44), and blew her whistle in conformity with the regulations. She passed on starbord hand close aboard of one of the buoys marking the starboard side of the channel, then she passed a second one which she ran over, then having altered her course so as to keep more in the channel, she heard the bell of a ship, which proved to be the *Sidra*. The sound seemed to her to come from dead ahead; her course was altered so as to bring it on the starbord bow. But suddenly the shape of the steamer loomed up dead ahead at about 100 or 150 feet. The *Potomac* immediately reversed the engines full speed astern, but she was unable to check her headway in sufficient time to avoid collision. The *Potomac* collided with the *Sidra* at about right angles, causing her a large amount of damage without damaging herself. At the moment of the collision it was 8:15 a.m.

A few days after the collision occurred, i.e. on November 3, 4, 6 and 9, 1905, a United States Naval Board of Investigation was convened by the Commander in Chief of the North Atlantic Fleet, to inquire into he circumstances of the collision, and to express an opinion as to which one of the two vessels was responsible for the collision. The conclusion reached by that board was that the *Sidra* was responsible, as she might have anchored well clear of the channel and she did not.

Before this Tribunal the British Government contend that the collision occurred by the fault of the *Potomac* in that she was proceeding at an excessive rate of speed in fog and did not stop her engines and navigate with caution on hearing forward of her beam the fog signal of a vessel anchored, whose position was not ascertained, and further in that the *Potomac* did not keep within the channel but ran outside thereof, and in that she did not maintain a proper or sufficient lookout.

The United States Government contends that the collision was due to the fault of the *Sidra* in anchoring in the channel and obstructing the path of navigation, while she might, without difficulty and with perfect safety, have been anchored outside and out of the path of other vessels.

According to the well settled Admiralty rule, recognized both in the United States and Great Britain, in case of a collision between two ships,

one of them being moving and the other at anchor, the liability is for the vessel underway, unless she proves that the collision is due to the fault of the other vessel.

Consequently in this case, the responsibility lies upon the *Potomac* and the Government of the United States, unless and so far as it is established that the *Sidra* was in fault.

In that respect there is not sufficient evidence to show the exact location of the place where the *Sidra* anchored and the collision took place. It has been stated by the commanding officer of the *Potomac* (United States Answer, p. 17) that the *Sidra's* anchor was a little outside the line of buoys on the easterly or starboard side of the channel, the ship herself lying across the channel. Also, there is the concurring statement of those on board two other vessels, the *Chicago* and the *Sparrow*. The *Sparrow* said that she saw the *Sidra* lying her portside parallel with the line of the channel about 50 yards from it, i.e., 160 feet. And the *Chicago* said that she saw the *Sidra* lying from 150 to 200 feet from the channel and at the time the vessel did not project into the channel.

On the other hand, the testimony of the captain of the *Sidra* shows that he took no soundings before or when anchoring (British Memorial, p. 41); that he did not know where he anchored from bearings, buoys, etc. (*ibid.*), and that he anchored when he thought he was clear of the channel, but he did not know (*ibid.* question 31, p. 41; question 79, p. 70; see also p. 76), and that after the collision at 8:20, the tide beginning to change, he used the engines to bring the vessel around quicker, in order not to be laying across the channel, and afterwards changed her anchorage in order not to be "worrying about" vessels passing up and down; furthermore he admitted that he could have gone at least half a mile further to the northeast with entire safety and that there is ¾ of a mile between the line of the channel and the shoal water (see British Memorial, pp. 64, 65, 70).

No sufficient evidence is afforded by the British Government to contradict the above elements of proof, from which it results that the *Sidra* anchored outside the channel, but, being given her 322 feet length, not far enough to prevent her from rounding across the eastern side of the path of navigation. As noted by the United States Board of Inquiry, "prudence would dictate to any vessel finding herself under the necessity of anchoring to choose a position well clear of the channel." This the *Sidra* did not do, and no reason is given why it could not have been done. As it has been shown there was about ½ mile room farther outside the channel; the *Sidra* said that she rounded one of the buoys marking the channel before anchoring; then she had the possibility of calculating how far she had to go to be certain she was entirely clear of the line. It was so much more her duty to do it, since she heard the whistle of other vessels in the neighborhood. (British Memorial, p. 66, question 50.)

By that lack of prudence, the *Sidra* had, in this Tribunal's opinion, contributed to the collision.

As regard the *Potomac,* this Tribunal regrets not to have before it such important testimonies and documents as the testimony of the chief engineer and the log book of that vessel. But it results from the testimony of the commanding officer that when the vessel heard the bell of the *Sidra* she was going at 4 knots an hour, and that after she had stopped her engines and altered her course to port, again she continued her course ahead under the same speed (United States Answer, pp. 16, 32, 46 and 62) without ascertaining the location of that bell.

In dense fog, it is the common rule of prudent navigation not only to stop as soon as a bell is heard, but also to keep stopped until the location of the other vessel ringing the bell and being an obstruction be ascertained, and everybody knows that it is impossible in fog to rely upon the apparent direction of the sound for ascertaining that location (see Marsden, Collisions at Sea, pp. 378, 379).

That rule is confirmed by articles 16 and 23 of the Inland Rules of the United States as they have been construed by various federal decisions (*The Grenadier* v. *The August Korff,* 74 Fed. Rep. 974, 975).

Furthermore it must be observed that whatever be her naval orders, the *Potomac* was proceeding in a narrow channel of 600 feet wide, frequented by numerous ships going up and down, and that she knew another steamer was ahead on her way, and she had to be especially cautious as to her speed, and the strict observance of the most prudent navigation. The *Potomac,* as has been shown, had no lookout on the forecastle and she was proceeding in a fog so dense that she was unable to sight the *Sidra* until about 50 feet before colliding and she was proceeding at such a speed as to make her unable to avoid collision.

For these reasons, the *Potomac* is to be held responsible for the collision, for not navigating with sufficient prudence, and on the other hand, the *Sidra* is to be held as having contributed to the collision by having imprudently anchored too close to the channel.

According to the well settled rule of international law, the collision having occurred in the territorial waters of the United States the law applicable to the liability is the law of the United States, according to which when both ships are to blame the damage suffered by each of them must be supported by moiety by the other.

It results from the United States inquiry that the *Potomac* suffered no damage, and it is shown by the documents that the damage suffered by the *Sidra* amounts to £4,336/7/4, including £750 for demurrage. Consequently the United States Government, as the owner of the *Potomac,* is liable for £2,168/3/8.

As for the interest, it seems difficult to consider the letter of November 10, 1905, by which the representatives of the *Sidra* asked for the result

of the United States Naval investigation, as having brought the present claim to the notice of the United States Government.

FOR THESE REASONS:

This Tribunal decides that the United States Government shall pay to His Britannic Majesty's Government for the benefit of the owners of the *Sidra*, the sum of Two thousand one hundred and sixty-eight pounds, three shillings and eight pence (£2,168/3/8).

The President of the Tribunal,

HENRI FROMAGEOT.

## IN THE MATTER OF THE SCHOONERS JESSIE, THOMAS F. BAYARD, AND PESCAWHA

### CLAIMS NOS. 24, 25, AND 26

*Decision rendered December 2, 1921*

These are three claims presented by His Britannic Majesty's Government: (1) for $38,700 on behalf of the British schooner *Jessie*, (2) for $51,628.39 on behalf of the British schooner *Thomas F. Bayard*, (3) for $52,661.60 on behalf of the British schooner *Pescawha*, together with interest from June 23, 1909.

It is admitted that the *Jessie*, the *Thomas F. Bayard*, and the *Pescawha*, all of them British schooners, cleared at Port Victoria, B. C., for sealing and sea otter hunting, and were in June, 1909, actually engaged in hunting sea otters in the North Pacific Ocean; that on June 23, 1909, while on the high seas near the north end of Cherikof Islands they were boarded by an officer from the United States Revenue Cutter *Bear*, who, having searched them for seal skins and found none, had the firearms found on board placed under seal, entered his search in the ship's log, and ordered that the seals should not be broken while the vessels remained north of 35° north latitude, and east of 180° west longitude.

The United States Government admits in its answer to the British Memorial that there was no agreement in force during the year 1909 specifically authorizing American officers to seal up the arms and ammunition found on board British sealing vessels, and that the action of the Commander of the *Bear* in causing the arms of the *Jessie*, the *Thomas F. Bayard*, and the *Pescawha* to be sealed was unauthorized by the Government of the United States.

The United States Government, however, denies any liability in these cases, first, because the boarding officer acted in the *bona fide* belief that he had authority so to act, and second, because there is no evidence on the claims except the declaration of the interested parties, and because these claims are patently of an exaggerated and fraudulent nature.

*I. As to the liability:*

It is a fundamental principle of international maritime law that, except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal, and constitutes a violation of the sovereignty of the country whose flag the vessel flies.

It is not contested that at the date and place of interference by the United States naval authorities there was no agreement authorizing those authorities to interfere as they did with the British schooners, and, therefore, a legal liability on the United States Government was created by the acts of its officers now complained of.

It is unquestionable that the United States naval authorities acted *bona fide*, but though their *bona fides* might be invoked by the officers in explanation of their conduct to their own Government, its effect is merely to show that their conduct constituted an error in judgment, and any government is responsible to other governments for errors in judgment of its officials purporting to act within the scope of their duties and vested with power to enforce their demands.

The alleged insufficiency of proof as to the damage and the alleged exaggeration and fraudulent character of the claims do not affect the question of the liability itself. They refer only to its consequences—that is to say, the determination of damages and indemnity.

*II. As to the consequences of the liability:*

It must first be observed that the insufficiency of proof as to damages, and the alleged exaggeration of the claims formulated by the British Memorial are not enough in themselves to justify the charge that they are fraudulent in character. For this Tribunal, the mere fact that the claims are presented by the Government of His Britannic Majesty is sufficient evidence of their complete *bona fides*.

The three schooners, after their arms and ammunition had been sealed with an order that the seals must not be broken until they were outside the conventional protected zone of fur-sealing, went across the North Pacific Ocean to catch fur-seals alongside the Russian islands in the western part of that ocean.

It has been submitted by the United States Government that in any event the vessels would have made the same voyage; but of that contention no sufficient evidence has been given.

On the other hand, it is shown by the agreements with the crews that the possibility of such a voyage was contemplated by the owners and the captains. It is admitted by counsel for Great Britain that no damage was actually suffered on the voyage by any of the three vessels. Further, it is admitted that the catching of fur seals on the coasts of the Russian islands

was profitable, though a request by this Tribunal for some detailed information as to these profits has not been satisfied.

There has been adduced no evidence sufficient to establish that had there been no interference by the United Stats naval authorities the vessels would have made more or any profit from sea otter hunting in Behring Sea. It is admitted by the counsel for Great Britain that nothing is so uncertain as the profits of such a venture.

The amount of the demands is based merely on statements made by the interested parties themselves or on statistics and data which afford no sufficient evidence as to the sea otters caught by other British schooners, similarly equipped and manned, hunting during the same period and in the same localities as the three schooners in question intended to hunt.

In these circumstances, this Tribunal is only able to take into consideration the fact of the prohibition itself, by which in violation of the liberty of the high seas the vessels were interfered with in pursuing a lawful, and, it may be, profitable enterprise; but nobody can say whether that enterprise would have been more or less profitable than the one in which they actually engaged on the Russian coast or whether they would have encountered some mishap of the sea. In any case, the result was that the expenses incurred in engaging crews specially trained for this enterprise was unprofitable and wasted.

This Tribunal is of opinion that the following sums will be just and sufficient indemnities for each of the three vessels, viz.: for the *Jessie,* $544 for her special expenses and $1,000 for the trouble occasioned by the illegal interference; for the *Thomas F. Bayard,* $750 for her special expenses and $1,000 for the trouble occasioned by the illegal interference; and for the *Pescawha,* $500 for her special expenses and $1,000 for the trouble occasioned by the illegal interference.

As to interest, there is no evidence that any claim was ever presented to the Government of the United States before being entered on the Schedule annexed to the Special Agreement, and according to the terms of submission, section four, interest may only be allowed from the date on which any claim has been brought to the notice of the defendant party.

FOR THESE REASONS:

This Tribunal decides that the Government of the United States shall pay to the Government of His Britannic Majesty, the sum of One thousand five hundred and forty-four dollars ($1,544.) on behalf of the Schooner *Jessie,* the sum of One thousand seven hundred and fifty dollars ($1,750.) on behalf of the Schooner *Thomas F. Bayard,* and the sum of One thousand five hundred dollars ($1,500.) on behalf of the Schooner *Pescawha,* in each case, without interest.

The President of the Tribunal,

(Signed) HENRI FROMAGEOT.

## THE AGIENA[1]

*Belgian Council of Prizes, 1919*

In case No. 53, sailing vessel *Agiena,* the Council renders the following decision:

In view of the introductory petition presented by the Commissioner of the Government requesting that the capture of the sailing vessel *Agiena,* formerly belonging to H. J. Hill of Rotterdam, be declared legal and valid for the benefit of the Belgian State;

In view of the other documents incorporated into the pleadings;

Whereas, M. Bauss, attorney, enrolled in the list of attorneys of Antwerp, has presented himself for the following second party: [List of English underwriters omitted.]

Having heard the Commissioner of the Government, Van Gindertaelen, as well as the said M. Bauss, in their respective pleas and motions;

Whereas, the English underwriters, listed under the letters A, B, C, D, E, present themselves as having insured the ship *Agiena* against risks of war and total loss, and as being subrogated in all the rights of the Dutch owner, M. H. J. Hill, in consideration of having indemnified him for the said total loss;

Whereas, their intervention in the case is admissible;

Whereas, it is otherwise in the case of the English underwriters listed under the letters F to P who availed themselves of the subrogation in the rights of the *Eerste Hollandsche Vensterglasfabriek* relating to the insured merchandise;

Whereas, in fact the Commissioner of the Government sues only for the validation of the capture of the ship, and whereas, the cargo which has not been made the object of any capture on the part of the Belgian State, and over which no rightful claim arises, cannot give occasion for a decision by the Council;

Whereas, the intervention of the said English underwriters is henceforth nonadmissible;

In law:

Whereas, public international law is the sum total of the rules that have emanated from natural reason, consecrated by customs and treaties, which fixes the mutual relations of states in the general and public interest;

Whereas, if the natural law of nations, which finds its source in reason and conscience, should inspire positive law as an ideal toward which it must strive, it has no immediate and practical value and it cannot be reverted to except in default of treaties or usages resulting from the common consent of states; whereas, the sources of the positive law of nations can be summed up under the following two general heads: principal and

[1] Translated from the *Moniteur Belge,* 1920, p. 405.

direct sources comprising treaties and usages, and accessory and indirect sources comprising the legislation and jurisprudence of states and the doctrine of authors (Georges Bry, *Précis élémentaire de droit international public*, pp. 4, 6);

Whereas, it is accordingly quite indifferent whether the question in dispute is or is not covered by Belgian law, from the moment when it has been established that its solution can be derived from other sources of an equal, or a superior degree, of international law;

Whereas, the circumstance that the Council should necessarily render judgment in accordance with the principles of this law and is not bound by national laws rather constitutes for the interested parties a guarantee of impartial justice;

Whereas, it was not a sort of defiance toward the national prize court, which it instituted, that prompted the Belgian legislature to make possible an appeal, either determined or eventual, against the decisions of the former, but the intention of conforming to a usage universally followed by maritime nations as well as to the provisions of the Hague Convention relative to the establishment of an International Prize Court;

Whereas, in the accomplishment of the mission devolving upon it, the Council could not have had any other concern than that of deciding in accordance with the rules of law and justice and of pronouncing its judgment with all the impartiality that may be expected of a Belgian tribunal, in validating prizes, if this measure becomes necessary, and, in the opposite case, in allotting to Belgium the legitimate advantage of a law which is justified by her victory and her sacrifices;

Whereas, prize law belongs to that class of law which very ancient usages have consecrated as much as an international law recognized by all peoples; whereas, this law has been maintained, save for certain restrictions, by numerous provisions, explicit or implicit, of the Hague Convention, although it had been the object, in the Conference, of spirited criticism, and although the delegates of the majority of the states had voted a proposition tending toward its abolition;

Whereas, this extraordinary result is due to the preponderating intervention of the delegates of certain great maritime Powers who emphasized —and not without reason—counter to the apparently justified principles of law and equity invoked on the other hand, that in naval warfare things do not present themselves as in land warfare; that the violent operations of war that are found there do not suffice in general to lead the adversary to conclude peace, and that it is, moreover, necessary for a belligerent to have the means of checking the economic life of his adversary by hindering or even suppressing his commerce with the outside world; that since the seizure of enemy merchantmen can bring about this disturbance in the economic life of the country to which they belong, it appears henceforth as a powerful means of coercion and ultimately as a measure directed by

a belligerent state more against another belligerent state than against individuals, and which can contribute effectively to bring about a quick peace, to save many human lives, which are more precious than material goods. (Speech of Louis Renault in the Second Hague Conference of 1907.);

Whereas, it was necessary to recall these important considerations in order to avoid combating in the present litigation indirectly and unjustly the legitimacy of a system of law which, notwithstanding a different ideal to which civilized nations, it seems, ought to tend, forms an integral part of positive international law, and which can only be suppressed by virtue of an express provision consecrating the absolute inviolability of private property not only on sea but also on land;

Whereas, although it has not been codified, prize law is nevertheless governed by certain essential and precise rules upon which, whatever may be said thereof, an agreement has been reached between nations of maritime power, and which in spite of inevitable divergences of application, can serve as a basis of appreciation even for a nation deprived up to the present time of imposing naval forces and for the prize tribunal which the fortune of arms has permitted it to establish;

1. Whereas, one of these most essential rules lies in the fact that the decision of a prize tribunal which validates a capture has the effect of depriving the owner of his right of property over the enemy or neutral vessel, and of transferring this right to the state of the captor; whereas, the vessel changes thus in a legal way its flag and its nationality;

2. Whereas, a second principle, also quite certain and universally admitted, provides that it devolves only upon the prize tribunal of the country from which the captor originates, to the exclusion of every foreign jurisdiction, to adjudge the permissibility of the capture, and consequently to pronounce judgment upon the vadidity thereof;

Whereas, without doubt, such decisions are not absolutely irrevocable, and, after all, the fate of a ship captured by a belligerent depends eventually upon the conditions of the treaty of peace, but whereas it is none the less true that as long as the war continues these decisions preserve their legal validity and their character relating to the ownership, subject only to be eliminated by virtue of the conditions of peace;

3. Whereas, according to another principle which dominates all maritime prize law, every merchantman of enemy character can be legally captured unless covered by one of the cases restrictively determined by the Hague Convention or the Declaration of London, and which do not exist in the present instance;

Whereas, from these three rules, well determined and incontestable, there follows the consequence that no "recapture" or "recovery," in the sense and with the effects that are generally attached to such an operation in international law, can take place unless before the recapture of the vessel

a confiscatory sentence has been rendered by the prize tribunal of the enemy, such a sentence having the effect of depriving the owner definitively of his right. "Capture," says Georges Bry (p. 492, ff.), "has in the first place only a provisional and precarious character which in definitive law is transformed only by the judgment of the courts entrusted with pronouncing upon its validity. When the prize has been taken away from the captor after the seizure and *before the confiscation pronounced by sentence,* a 'recapture' takes place; this is the re-establishment of the previous state; the owner, whose ship was captured, recovers his property; the seizure is purely and simply annulled" (see in the same sense Wheaton, *Elements of International Law,* II, pp. 20 ff.; Despagnet, p. 665 and 666; Travers Twiss, pp. 324 ff.; Carlos Testa, p. 43; Pasquale Fiore, p. 521; De Pistoye and Duverdy, II, pp. 105 ff.; Calvo, V, Sec. 3198. See also *Revue de Droit International,* Vol. VII, p. 612; Report of M. Alberic Rolin to the Fifth Commission, *Institut de Droit International,* 1875, reproducing the corresponding opinions of Bluntschli and de Bulmerincq, as well as the Italian author, Schiattarella [on the recapture of neutral vessels].

Whereas, the recapture of a ship from the enemy after its condemnation in a prize court constitutes, therefore, in reality a new prize, having for its object a vessel of enemy character and not being able to admit the obligation of restoring it to the former owner;

Whereas, the words "recapture" and "recovery" are synonymous, and in former privateering warfare, today abolished, the expression "to pursue the recovery of a ship" meant to follow the vessel which had seized the ship, with the intention of capturing the former together with its prize, or at least of obliging it to abandon this prize, in depriving it thereof. (de Pistoye and Duverdy, *loc. cit.*);

Whereas, such an operation implied naturally and according to the principles formerly admitted, that the vessel should be recaptured within a period relatively close to the time of its capture, and particularly within a period of twenty-four hours, fixed by the then prevailing custom, in such a way that the ship might be considered as finding itself firmly in the possession of the captor after such a delay; and as having changed ownership; whereas, later it was required, in order to justify the assumption that the owner had been deprived of his right, that the vessel should have been escorted to safety by the captor in a port *infra proesidia,* and as the English prize decisions say: "Brought into a place so secure that the owner can have no immediate prospect of recovering it"; whereas, in the case of the *Santa Cruz,* judged in 1798, and relative to some allied Portuguese vessels captured by the French and recaptured by the English, the learned jurisconsult Sir W. Scott did not hesitate, from the point of view of theoretic principles, to consider the *deductio infra proesidia* as the true rule which, in his opinion, should decide the deprivation of the owner, although other nations, he added, may be far from agreeing on this point and may

be content to follow the twenty-four hour rule, or some other more rigorous rule of that nature; but, whereas, however that may be, "right of recapture" has undergone evolutions in the different countries, and from remote times up to our day there has never been any doubt, from the point of view of the principles of international law, that at least a confiscatory sentence of a prize tribunal should have the effect of depriving the owner of his right and should hinder the obligation of restitution in case of recapture from the enemy;

Whereas, this is the formal rule proclaimed by the United States of America in the Act of Congress of 1800, maintained in force since that time, and which is applicable in equal measure to the national or allied vessels recaptured from the enemy as it is to neutral vessels. (See Wheaton, *loc. cit.*);

Whereas, with regard to England, Article 40 of the Naval Prize Act of 1864 limits itself to stipulating the right to restitution for the benefit of British subjects, and whereas if this provision, which moreover reproduces similar provisions of earlier acts of Parliament going back to the year 1649, has been interpreted and applied in this sense, namely, that the right to restitution was acquired regardless of whether the recapture was effected before or after the condemnation of the vessel, it is in accordance with this that England intended to favor her national subjects with regard to the ever increasing development of commercial property; but, whereas, it could not result from this special law thus proclaimed by England for herself, and of a restrictive character, that subjects of allied or neutral Powers should be admitted to enjoy the benefits thereof to the whole extent to which it has been interpreted and applied;

Whereas, it is true, as Sir W. Scott said in the case of the *Santa Cruz*, "that the maritime law of England, having adopted a broader rule of restitution or of safety with regard to recaptured property of her subjects, grants the benefits of this rule to her allies as far as the point where they seem to act toward English property according to a less liberal principle, and in such a case she adopts their rule and treats them according to the measure of their justice." But, whereas, all this is only true in so far as no condemnation of the allied vessel by any enemy prize court has taken place, since the acts of Parliament have put into force again, as far as English subjects only are concerned, the *jus postliminii* of the orginal owner. (See Wheaton, *loc. cit.*, in this sense.);

Whereas, with regard to neutrals, the English courts have generally decreed the restitution in case of "recapture" properly so-called, even without indemnity, unless the vessel has been in danger of condemnation by the enemy, in which case indemnity was due; but, whereas, they have always considered that the recaptured vessel only had neutral character in the absence of a condemnation by the prize tribunal of the enemy, which legally brought about the deprivation of the owner and the change of

nationality of the ship. (Argument of Sir W. Scott in the case of the *Charlotte Caroline*, Prize Cases II, 149.);

Whereas, the legislation of other countries, such as Holland, Denmark, Spain, Sweden, and Portugal, has likewise undergone evolutions, but in every case within the limits indicated above, that is to say, that the owner was necessarily deprived of ownership by virtue of a sentence of condemnation;

Whereas, especially, when the Ordinance of March 28, 1810, returned the Danish property or the property of the allies of Denmark, without regard to the time that it had remained in the possession of the captor, upon payment of one-third of the value as salvage, the law of February 3, 1864, provided, on the contrary, that the Danish vessels recaptured from the enemy are considered as valid prizes;

Whereas, the Italian Code of Maritime Law, promulgated in 1865, established several distinctions which differentiated national or allied merchantmen recaptured by a privateer and such vessels recaptured by a man-of-war, according to which the latter must be restored to their owner without remuneration, even if they have already been taken to an enemy port; whereas, the same is true of a foreign vessel freighted on account of the state, but no mention is made of a foreign vessel not freighted on account of the state, from all of which it must be concluded that a neutral vessel as well as a national or allied vessel whose ownership has passed over into the hands of the belligerent by virtue of a judgment should not be restored in case of recapture;

Whereas, in France the Decree of Prairial of the Year XI is applicable to French or allied vessels, to the exclusion of neutral vessels; whereas, with regard to the former there is no proof that it has had the effect of derogating from the universally admitted principle which provides that a confiscatory sentence pronounced by the competent prize tribunal effects a change of character of the vessel; whereas, the repeal of the twenty-four-hour rule proves moreover that it has not been possible to consider an effective recapture after a rather long lapse of time such as is generally supposed by the formalities and the prize procedure according to the regulations in force; whereas, the neutral vessels that are recovered should be restored according to the principles of international law, but whereas, on the other hand, the reason which compelled their restitution disappeared in case of recapture after condemnation by the prize tribunal of the enemy;

Whereas, in the case of the privateer *Le Hasard* v. *The Statira*, M. Portalis, Commissioner of the Government, expressed himself as follows under the guidance of the Decree of Prairial: "If we are dealing, on the contrary, with a foreign vessel claiming to be neutral, the arrest of this vessel by the enemy does not render it suddenly enemy property, since its confiscation cannot be pronounced by the magistrate. *Until the confiscatory judgment the ship sailing as a neutral loses neither its character nor*

*its rights.* After the arrest it can recover its liberty. *In such a case* the recovery of this vessel could not, therefore, bring about the transfer of ownership into French hands by which this recovery was operated. The question of neutrality always remains entire; it should be decided before everything. Such is the language of all the publicists, such is the custom of all the civilized nations. This being admitted, the ship *Statira* has not become confiscable *by the fact alone* that she was recovered from the enemy" (de Pistoye and Duverdy, II, p. 123);

Whereas, it was apparently due to these so judicious and juridical observations that in the course of the recent war of 1914-1918 the instruction of the Minister of Marine of January 30, 1916, was rendered in so far as it dealt with "recovery"; whereas in speaking of French or allied vessels captured by the enemy "you will strive to effect their recovery," and furthermore of the neutral vessels recovered "you will release them purely and simply," these instructions show that we are not dealing with a recapture after a capture of firm possession on the part of the enemy and a sentence of condemnation by one of its prize tribunals, but of a ship which remained legally and apparently neutral according to international law and the distinguishing signs which should cause it to be recognized as such;

Whereas, quite similarly to the Hague Convention, the Declaration of London recognized in several of its provisions and particularly in its Articles 41, 48 and 66, the legality of national prize jurisdiction, and whereas, it would be a fruitless question if we were to inquire into the *raison d'être* of these provisions if the effects of a sentence of condemnation were not to be imposed upon all with the same authority, belligerents as well as neutrals, the latter having to submit thereto by virtue of the necessity of war; whereas, it cannot be seen moreover how it would logically be possible to admit the effects of such a sentence in the relations between the captor and the captured, and to refuse to apply them in the relations between the captured and a recaptor;

Whereas, Article 57 of the Declaration of London provides that the neutral or enemy character of the vessel is determined by the flag which it is entitled to fly; whereas, after a confiscatory sentence pronounced by the prize tribunal of a belligerent, the flag which an enemy or neutral vessel is entitled to fly is that of the belligerent who has made the capture, and this legal change of flag renders the vessel confiscable on the part of the opposing belligerent, as an enemy vessel; whereas, it follows from the preceding considerations that according to the spirit of the international treaties and according to modern usage adopted by all nations, the decision which validates a prize fixes in a definite manner the juridical fact of the deprivation of the owner, the cause of the right of the recaptor, and that while admitting that according to the countries and the cases given, it may have been possible to make varying applications of this principle, it de-

volves upon the council to adhere purely and simply to the American Law and to derive therefrom the sole logical consequence which it admits, namely, the absence of the obligation of restoration in case of recapture of a neutral or allied vessel;

Whereas, the English underwriters maintain, unjustly, that it is not possible to attach any value to the decision of the German prize jurisdiction for the reason that the capture in question was only an act of piracy violating the rights of neutrals and the Declaration of London to which Germany has adhered;

Whereas, if it were necessary, in the present case, to investigate whether the German decision was or was not rendered in conformity with the rules of international law and of the Declaration of London, it would be in order to observe that in fact the latter Declaration has not been perfectly respected by any of the belligerents; whereas, the Allied Powers have been forced by the attitude and the unjustifiable methods of war of Germany to make modifications thereof in conformity with their most essential interests, particularly with regard to the specification of articles of absolute or conditional contraband; whereas, Germany has, on her part, made modifications of the Declaration touching the same point, and, whereas, thus the belligerents have released themselves mutually and in a tacit manner from their reciprocal obligations in this respect, in such a way that the violation of these obligations cannot be charged against them; whereas, the neutrals have moreover been warned by the notifications of decrees of the various belligerents of the fact that they would no longer be able to count upon the integral execution of the Declaration of London with regard to the limitation of articles of contraband, and whereas, they have, nevertheless, and at their own risk, undertaken maritime expeditions involving the prohibited goods; whereas, international law admits, moreover, that a belligerent, with a view to safeguarding his interests, which he considers essential, exercises a certain pressure upon neutrals in reducing their commercial relations with the outside world, and the loss which results for them therefrom is amply compensated for by the enormous advantages which after all their commerce secures for them in time of war (Clunet, *Journal de Droit International,* 1919, 1st and 2d books);

Whereas, in reality, the prohibition resulting from Article 28 of the Declaration, interdicting the treating of window glass as contraband, with which the present litigation deals, did not touch the substance of international law as other stipulations contained in the Declaration, and which are only the reproduction of certain rules of this law already recognized in their broad outlines by the customs of the nations; whereas, an infraction of such a prohibition, purely conventional and more or less arbitrary, does not appear to have assumed in the mind of the belligerents any more than in the mind of the neutrals, who are forced to accept it, the character of a violation of a principle or of an essential rule of international law;

But, whereas, under any hypothesis, the jurisdiction of the court of the nation which has made the capture is conclusive on the question of ownership of the captured property; whereas, its decision terminates every controversy relative to the validity of the capture between the claimant and him who has made the capture and those who claim after them that this sentence terminates every juridical question on the matter; whereas, if the violation of international law has been committed by a prize tribunal, it follows therefrom solely that the state which has instituted the tribunal and which is supposed to have given the latter its instructions, in conformity with Article 66 of the Declaration of London, is responsible by reason of such a violation, but not that it should be permitted to open again for discussion, either with regard to the captor or a recaptor, the question of ownership definitively decided by the competent tribunal or the validity of its decision (Wheaton and Georges Bry, *loc. cit.*);

Whereas, the Belgian State, in availing itself of the German prize decision, could not incur the reproach of wishing to sanction a violation of international law committed by the enemy; whereas, it limits itself to claiming the use of a right based upon the success of the military operations of its army and to desiring to derive the legal consequences from a situation which it has not created and with the justification of which it should not interfere;

Whereas, it is true, the final fate of the enemy prizes could depend upon the conditions of the intervening treaty of peace; whereas, it must be remarked that Article 440 of the Treaty of Versailles, in so far as it permits the revision by the Allied Governments of the decisions rendered by the German prize tribunals, is directed against Germany, in so far as the latter has preserved the possession of certain ships unjustly captured and declared by its tribunals to be good prizes and which could, as a result of a revision of the sentence, be detached from the lot of those ships that are to be returned to the Allied and Associated Powers in execution of the stipulations of the Treaty of Peace, for the purpose of being restored to the prejudiced neutral or allied subjects; whereas, this provision does not aim to do an injustice to one of the Allied Powers in depriving it of the benefits of a recapture based on a German prize decision.

In fact:

Whereas, on July 12, 1917, the sailing vessel *Agiena,* flying the Dutch flag and bound from Maassluis to Havre with a cargo composed especially of cases of window glass, was seized as a prize in the North Sea by German hydroplanes and taken by a torpedo boat to Zeebrugge, and from there to the interior port of Bruges, where it was chartered by the Netherlands firm Gist en Spiritus Fabriek for voyages between Bruges and Brussels;

Whereas, it follows from the documents in the dossier that the vessel was declared a good prize by a decision of the Hamburg Court rendered under date of November 16, 1917;

Whereas, it follows therefrom, as well as from the considerations made above, that the *Agiena* became a German vessel and that it was subject to capture when, on October 19, 1918, the Belgian troops captured it in the port of Bruges;

Whereas, while admitting, in default of greater precision on the part of the dossier, that the vessel was condemned on account of carrying contraband of war, notwithstanding Article 28 of the Declaration of London which forbade the treatment of glassware as such, the decision of the German prize jurisdiction is nevertheless possessed of a legal force imposing itself upon all and of such a nature as to form the basis of the right of capture of the Belgian State;

Whereas, it is true, the English underwriters in the case maintained, with documents in support thereof, that on July 23rd and 26th, 1917, that is to say, between the date of capture and that of the decision of the prize tribunal, they insured the hull of the ship for the benefit of the Dutch owner and that as a result of the payment of the indemnity by them for the total prize they have become subrogated to his rights with the consequence that the ship had become their property and was considered to be flying the English flag at the date of its recapture from the enemy;

But, whereas, this circumstance could not have the effect of modifying the juridical situation resulting from the German prize decison;

Whereas, in principle, the said underwriters could not have, with regard to the recaptor, more rights than the previous Dutch owner had, deprived of every remedy against the former; whereas, it is indifferent that the date of their title antedates that of the judgment validating the prize; whereas, the ship was captured and judged as a neutral vessel having infringed upon the rules of neutrality; and, whereas, it was recaptured as an enemy and neutral vessel before its original capture, the latter alone having to be considered in the present case;

Whereas, to admit a contrary solution would result in permitting the evasion of the consequences of the previously neutral character of the vessel in case it would be in order to treat differently neutral vessels and allied ships recaptured from the enemy;

But, whereas, as it has been shown, no difference is to be made between the two cases and restitution of the ship is not in order no matter what point of view is taken;

Whereas, it follows from these considerations that the recapture of the ship *Agiena* by the Belgian troops is permissible and valid with respect to the English underwriters in the case; that it would have been declared thus also with regard to the firm Nederlandsche Gist en Spiritus Fabriek, which, it is alleged, purchased the ship at the German prize office under date of October 5, 1918, that is to say, at the time when, given the military situation, there was reason to fear that the vessel would come into the hands of the Allies, and therefore, with the manifest object on the part of

the German authorities to evade the consequences of the enemy character of the vessel, and hence under such conditions that the transfer to a neutral flag must be considered void according to the incontestable principles of international law, confirmed by Article 56 of the Declaration of London;

FOR THESE REASONS:

The Council having heard the Commissioner of the Government, Van Gindertaelen, in his pertinent motions, rejecting all contrary claims as unfounded, declares inadmissible the intervention of the English underwriters listed under the letters F to P, and acknowledging to the English underwriters listed under letters A to E the fact that they estimate the litigation for each of them at more than 20,000 francs, declares legal and valid the capture of the sailing vessel *Agiena*, and decrees that this vessel shall belong in its totality to the Belgian State. Expenses as in law.

## THE BRUSSELS[1]

*Belgian Council of Prizes*

Antwerp, October 23, 1919

In case No. 46, *S.S. Brussels*, the Council renders the following decision:

In view of the introductory petition presented by the Commissioner of the Government requesting that the capture of the steamer *Brussels*, of about 1380 tons, formerly belonging to the Great Eastern Railway Company, whose offices are at Harwich, be declared effective and valid for the benefit of the Belgian State;

In view of the other documents incorporated into the pleadings;

Having heard the Commissioner of the Government Van Gindertaelen in his reasons and motions;

Whereas, the steamer *Brussels*, flying the English flag and commanded by the late Captain Fryatt, was captured on the high seas by the German naval forces and taken to Zeebrugge; whereas, it was declared a legal prize by the decision of the Prize Court of Hamburg on November 15, 1916, confirmed by the Superior Prize Court at Berlin on July 29, 1917;

Whereas, it follows therefrom that the ship had become German property and that, according to the principles of the law of nations, it was subject to seizure when, in the month of October, 1918, the victorious Belgian troops captured it in the port of Zeebrugge, where it was sunk by the enemy;

Whereas, no objection could be made that, forming the subject of the recapture of an allied ship, this ship should, according to international

[1] Translated from the *Moniteur Belge*, Nov. 6, 1919, p. 5894.

customs, have been restored to its former owner; whereas, in the first place, there does not exist any general usage, and even to a less degree any written international rule, binding the recaptor to restitution in such a case; whereas, the Hague Convention is silent on this subject; whereas, as the judgments of this court, dated October 17, 1919, in the case of the *S.S. Midsland* and *Gelderland*, declared, England herself has never admitted the restitution of an allied or neutral ship recovered from the enemy, except under the condition of reciprocity; whereas, in fact, no treaty of reciprocity exists on this subject between Great Britain and Belgium;

But, whereas, moreover, as appears from the same decisions, the recapture or recovery, with the rights and obligations which certain publicists of international law attach thereto, is possible only if no judgment validating the original prize has been rendered; whereas, in case of the existence of such a judgment, we are dealing with a new prize which is governed with respect to all neutrals as well as allies, by the ordinary rules, and which admits of no restriction upon the absolute rights of the captor;

Whereas, moreover, in every prize case there is a governmental phase in which the captor state may decide it opportune to act in a spirit of generosity toward an allied or neutral Power, and a contentious phase such as that in the present instance, in which the Prize Court vested with the litigation by the government of the captor state, has only to decide whether the prize was legitimately made according to the rules of international law;

Whereas, regardless of the regret that a Belgian prize court may feel in being compelled to retain an allied ship which has distinguished itself in the struggle against the common enemy, it could not, in the given case, allow itself to be guided by any other principles than those of the law, tempered according to the circumstances by justice, without deviating from its course of duty;

And, whereas, even if no judgment had been pronounced validating the German prize or if that prize were considered as not having been validly adjudged by the competent tribunal, the Belgian State would not in any less degree have derived as a result of the acts of the German authorities with regard to the ship a title to the prize in the juridical sense of the term, than it would have done later;

Whereas, in fact, as was found in the aforementioned judgments in the case of the *Midsland* and the *Gelderland*, the *Brussels* was sunk by the German naval authorities somewhat to the right and a little to this side of the head of the mole of Zeebrugge, that is with the manifest object of obstructing the passage to the sea; whereas, moreover, the aforementioned authoritites have caused twelve other ships to be sunk, either in the channel of approach to the sluice or in the floating docks of the ports of Brugge; whereas, all these operations formed an indivisible and systematically concerted unit with the double intention of bottling up the ports of Bruges,

already obstructed as a result of the heroic act of war of the British navy, and of hindering the Allied Powers from taking possession of these ships in order to use them for the transportation of troops, and material of war, or of provisions for the use of their army; whereas, the German authorities have thus acted for a clearly determined military and defensive object;

Whereas, in sinking the *Brussels* under the aforementioned conditions and after a detention of more than one year, these authorities have committed with regard to the ship an act of appropriation *jure belli*, characterized and definitive in such a way that with regard to the hostile belligerent, the Belgian State, which has captured the ship subsequently, this ship can and should be considered for this very reason as an enemy ship and of such a nature as to form a basis for the intrinsic right of the captor; whereas, only an eventual right to indemnity for the benefit of the injured private individual and against the German State by reason of such destruction, committed in the absence of any case of actual *force majeure*, is in order;

For these reasons:

The Council, having heard the Commissioner of the Government, Van Gindertaelen, in his pertinent motions and rendering judgment in the absence of all other interested parties, declares the capture of the steamer *Brussels* effective and valid for the benefit of the Belgian State, and decrees, consequently, that this steamer shall belong in its totality to the latter. Expenses as in law.

## THE GELDERLAND[1]

### *Belgian Council of Prizes*

### Antwerp, October 17, 1919

In case No. 44, *S.S. Gelderland*, the Council renders the following decision:

In view of the introductory petition presented by the Commissioner of the Government requesting that the capture of the steamer *Gelderland*, formerly belonging to the Stoomvaart Maatschappij Nederlandsche Lloyd, whose offices are at Rotterdam, be declared effective and valid for the benefit of the Belgian State;

In view of the other documents incorporated into the pleadings;

Having heard the Commissioner of the Government Van Gindertaelen, as well as the said company, represented by M. Georges Vaes, advocate at Antwerp, in their respective reasons and motions;

Whereas, the steamer *Gelderland*, flying the Dutch flag, was captured on July 23, 1917, on the high seas, by a German aeroplane, while it was

[1] Translated from the *Moniteur Belge*, 1919, p. 5772.

sailing from Newcastle to Rotterdam with a cargo of coal, because it was suspected of transporting contraband of war; whereas, being conducted to Zeebrugge, it was declared a valid prize by the Prize Court of Hamburg on May 31, 1918, and whereas, it was captured subsequently, in October, 1918, by the Belgian troops in a floating dock in the port of Zeebrugge, where it was sunk by the enemy;

Whereas, the judgment of the Prize Court has had the effect of transferring the ownership of the vessel in question to the German State, in conformity with the principles of international law and of German legislation; whereas, recourse against such a decision is not a bar to subsequent proceedings and the decision to be rendered on the appeal simply relates to or determines *ex nunc* the right of ownership;

Whereas, accordingly, the vessel captured by the Belgian troops when they seized the *Gelderland* in the waters of Zeebrugge, was an enemy vessel;

Whereas, although it is true that the capture did not effect a transfer of property, it did not to any less degree present an obstacle to the regularity of any subsequent decision of a German prize court pronouncing the liberation of the vessel; whereas, the military and naval situation of the German Empire was such that the vessel had to be considered as being definitively in the power of the Allies;

Whereas, the decision of the Supreme Prize Court of Berlin, rendered on October 24, 1918, on the appeal introduced by the interested company, which freed the vessel, is accordingly inoperative and only the Hamburg decision validating the prize remains effective;

Whereas, moreover, the act on the part of the German authorities in sinking the vessel without awaiting the result of the appeal from this decision, constituted a new and absolute bar to the subsequent possibility of the rendition of a decision by the Court of Appeals for any other purpose than to permit the interested company to claim damages from the German state; whereas, matters were no longer complete and the Greman Empire, having availed itself of an act of force in order to affirm its right of ownership over the vessel, had lost the right of recourse to prize procedure in order to have this right recognized or invalidated;

Whereas, it is certainly not permissible to maintain that because the capture was based upon a simple attack and an act of force, the effects thereof would be annulled by the loss of possession of the ship, which thenceforth would have to be restored to its original owner;

Whereas, in fact, in the present case the effects of the German capture have only been set aside with regard to the dispossessed enemy, and, whereas, they have not in any less degree constituted the basis of the right of the new captor, the Belgian State, without the original proprietor having been able to derive from the mere fact of dispossession a right to the restitution of his lost property;

Whereas, the act of force, namely, the maritime capture, engenders rights which are recognized by international usage and which the prize jurisdictions have the right to sanction legally; whereas in default of a decision invalidating the prize, force alone can finally annul the effects thereof;

Whereas, the decisions originating with the prize tribunals of a belligerent, when they have been rendered regularly, and when they do not violate the essential rules of the law of nations, can thenceforth serve as a basis for the creation of new laws for the benefit of the opposing belligerent and to the detriment of a subject of a neutral power; whereas, it does not devolve upon the latter to criticize such decisions for other reasons when the new captor accepts them and has an interest in availing himself thereof; whereas, the *Gelderland* was declared a valid prize by the Hamburg tribunal for the reason that it had sailed for the purpose of serving the maritime interests of the enemy and that it had been covered by an enemy charter;

Whereas, in the absence of an international agreement on this subject, the Prize Court of Hamburg has in the present case only made use of its right of interpreting and applying, within the limits of its competence, the national laws of its country, and, it has not thenceforth violated any principle whatsoever of the law of nations;

Whereas, the Stoomvaart Maatschappij Nederlandsche Lloyd appeals in vain to article 440 of the Treaty of Peace, which stipulates that the Allied and Associated Powers reserve the right to examine, in such manner as they may determine, the decisions and decrees of German prize courts, whether affecting the property rights of nationals of those Powers or of neutral Powers.

Whereas, in that case we are dealing with a condition imposed upon Germany and relative to the ships and cargoes captured by her but not recaptured by the Allies, and, whereas, the intention does not in any way exist to trace to the prize tribunals of the Allied Powers the obligation of controlling the German decisions which might be favorable to them in so far as they form the basis of their own rights, or of those of their nationals; whereas, moreover, the Belgian Government has not up to the present time availed itself of the privilege reserved to it by Article 440, and, whereas, if it should eventually exercise the privilege, the revision of the German decisions would doubtless take place by way of governmental and diplomatic action, and not through the medium of the prize courts, organized for the purpose of passing judgment on the validity of the prizes made by the Allies; whereas, the Stoomvaart Maatschappij Nederlandsche Lloyd maintains finally that the *Gelderland* was captured and seized for having rendered services to the Allies, and, whereas, it is a principle that in such a case the recaptured vessel should be restored to the neutral owner; whereas, the interested firm, as well as its sister firm the Scheepvaart en

Kolenmaatschappij of Rotterdam, appears to have had principally in mind not to render service to the Allies, but to look to its commercial interests by assuring the supply to Holland of English coal, the exportation of which the British Government authorized to neutral countries only in consideration of the corresponding importation of a certain quantity of goods destined for its own country, but whereas, even supposing that the *Gelderland* had been captured while in the service to the Allies, this circumstance would in itself, not be of such a nature in the present state of legislation or of international usages, to bind the Belgian State to release the prize;

Whereas, according to the doctrine of certain authors and early French jurisprudence, in case of recovery of a neutral ship, if the original prize has been declared valid according to the laws of the enemy country, the neutral no longer had any basis for a claim, since by the effect of the prize he lost his property in the ship, and the ship was adjudged to the captor; whereas, exception was made to this rule only if the neutral ship destined for a French port had been seized by the enemy solely because of the contraband articles or other effects that it was carrying (See Dalloz, *Répert. V., Prizes Maritimes,* No. 198, and De Pistoye-Duverdy II., p. 120);

Whereas, this exceptional concession to the rights of neutrals was far from being recognized by the other maritime countries; whereas England has never admitted this concession, either for allied property or for neutral property, except under condition of reciprocity, and upon payment of one-eighth of the value as salvage (Naval Prize Act of 1864); and, whereas, with regard to Holland, in spite of a reciprocity agreement concluded with England some years before, she refused in 1748 to admit this restriction, of the right of recovery of its privateers, however legitimate it might be, whereas, when an English vessel, the *Lydia,* after having been captured by a French privateer, was recaptured by a Dutch vessel and escorted to Zierikzee, and was reclaimed by England, the States General replied that the recapture belonged *jure belli* to the recaptors (Martens, *Armat.* 163 and note);

Whereas, France herself subsequently abandoned every idea of obligatory concession, and in 1870 gave absolute instructions which comprised only a slight restriction on the right of recapture: "The recovery of a national vessel," it is said, "will not form the basis of any right over the recaptured vessel. If the recaptured vessel is a neutral it will be seized as an enemy, if it has remained in the possession of the enemy more than twenty-four hours. If the vessel has not remained in the possession of the enemy for twenty-four hours, it will be released purely and simply." (Georges Féron, Paris, Doctoral Thesis on the Right of Maritime Capture, p. 106);

Whereas, although it is true that these instructions add to the statement of the rule of the right of recapture the words: "Save for exceptional circumstances, the application of which His Majesty reserves," we are deal-

ing there only with the part left to the initiative of the Government which can always be exercised relative to the seasonableness of the capture and under the form of restitution freely consented to, and in no respect with a latitude given to the tribunals called upon to pass judgment on the validity of the prizes, which have only to investigate whether the prize is legal according to the principles of international law;

But, whereas, moreover, the distinctions and restrictions in question above did not have any reason for existence and only found their justification very frequently in former privateering warfare, in which the vessel was captured without the original prize having been declared valid by the prize court of the enemy; whereas, if, on the other hand, such a judgment of validity had been rendered, the term "recapture" or "recovery" could not be properly used and the prize was a new one which was governed with respect to all, neutrals as well as allies, by the original rules;

Whereas, as Calvo in his *Droit International,* 5th edition, 1896, Vol. 5, paragraph 3198, states: "The principles generally admitted by the legislation of the chief maritime nations are as follows: ***Recapture is possible only if the prize has not yet been adjudged;*** until a tribunal has rendered judgment, the fate of the prize is uncertain; neither the captor nor the Government to which he is subject have any rights over the vessel or over its cargo, and as the prize depends only upon the right of the stronger, it can be annulled by force; the recapture can, therefore, by special application of the *jus postliminium* annul the original capture. But once a judgment has been pronounced, the prize becomes legally the property of him to whom it has been awarded; and if the ship is later captured by the enemy, it is just as if we were dealing with *a new prize.* Yet the recapture (that is, in the absence of every judgment), does not confer upon the recaptor the rights of the captor; it has effects which are essentially negative. The recaptor is bound to respect the goods which he has saved from the hands of the enemy, except that he is entitled to claim for his troubles and his losses a remuneration, the amount of which varies according to the particular legislation of the various countries on this point."

"If the case, however, be that of a foreign vessel, asserted to be neutral," Wheaton says in his *Elements of International Law,* vol. 2, "the seizure of this vessel by the enemy does not render it *ipso facto* the property of the enemy, *since its confiscation has not yet been pronounced by the competent judge. Until that judgment* has been pronounced, the vessel thus navigating under the neutral flag loses neither its national character nor its rights; although it has been seized as prize of war, it may ultimately be restored to the original owner. *Under such circumstances,* the recapture of this vessel cannot transfer the property to the recaptor. It followed that the vessel in question was not confiscable *by the mere fact* of its having

been captured by the enemy. Before such a sentence could be pronounced, the French tribunal must do *what the enemy's tribunal would have done:* it must determine the question of neutrality, and that being determined in favor of the claimant, restitution would follow of course." And, moreover, the same author, in order to justify a right of recovery in case of actual recapture added simply: "These violations of the ancient law of nations, committed in the course of the last European War (1870), in many cases made of the release of neutral property from their cruisers and *from their Prize Courts* (that is, before they had been adjudicated), a great service entitling to a remuneration in the form of a right of recovery to him who had effected the recapture of this property."

Whereas, therefore, no international usages exist in the sense of the thesis maintained by the Stoomvaart Maatschappij Nederlandsche Lloyd; whereas, the necessities of modern warfare appear to have hindered up to the present the conclusion of an international convention prescribing in an absolute manner and even when no judgment has been rendered validating the prize, the restitution of every private vessel and especially of every neutral vessel captured in time of war by a belligerent and recaptured by the other belligerent;

Whereas, in this regard, the international regulations on maritime prizes, formulated by the Institute of International Law in 1887, were not reproduced by The Hague Convention, in which the contracting Powers have, however, stipulated the restrictions which they have deemed it necessary to make upon the right of capture of enemy merchantmen, as well as the rights and duties of neutrals, and which do not include any exception relative to the right of recapture of neutral vessels; whereas, the general principle, whose existence the said convention implicitly recognizes for the benefit of the belligerents, remains thenceforth applicable to the case in hand;

Whereas, it has, therefore, been established that the *Gelderland,* at the time when it became the object of the Belgian capture, was German property, and, therefore, liable to be legally confiscated, and, whereas, the original neutral owner is not entitled to the restitution of the ship;

And, whereas, moreover, the German naval authorities have caused not only the *Gelderland,* but also twelve other ships to be sunk in the ports of Bruges or their appurtenances; whereas, one of these thirteen ships, namely, the *S.S. Brussels,* was sunk somewhat to the right and a little to this side of the head of the mole of Zeebrugge, another in the channel of approach to the sluice, and the others in the docks of the ports of Bruges and of Zeebrugge; whereas, these operations, which formed an indivisible and systematically concerted single act, had the manifest object of effecting the bottling up of the ports of Bruges, already notably obstructed as a result of the heroic act of war of the British navy, and of hindering the

Allied Powers from seizing these ships about to fall into their hands, in order to use them for the transportation of troops and material of war, or of provisions for the use of their armies; whereas, the German authorities have, thenceforth, acted for a clearly determined military and defensive purpose;

Whereas, in sinking the *Gelderland* under these conditions after a detention of almost two years, the German naval authorities have committed an act of appropriation *jure belli*, characterized and definitive in such a way that if, hypothetically, a regular decision had not been rendered previously, validating the prize, such an act would have taken the place thereof with regard to the recaptor, the Belgian State, and that in every case this act permitted the latter to seize in its turn and to use against the enemy material which the latter had transformed into an instrument of war for his defense;

Whereas, even if it is freely granted that prior to the destruction, the original neutral owner of the ship had remained the legitimate owner, he would then have only a claim for indemnity against the German State by reason of the arbitrary and illegal acts of the agents of the latter;

Whereas, having regard to the principles of international law, such destructions, committed by an enemy driven back to defeat, and without any case of actual *force majeure*, must be condemned, but, whereas, it is no less certain that according to the rules which govern land warfare and *a fortiori* maritime warfare, the Belgian State is justified in capturing a vessel which the enemy has treated in the most characteristic way as his own property for the organization of his defense and in pledging eventually his responsibility on the basis of a pecuniary compensation toward the interested third party;

Whereas, moreover, no argument could be based upon the conditions of the armistice ordering the liberation of the neutral ships seized by the Germans in the Black Sea, since the latter were not captured by the Allies, as the *Gelderland* was, at the time when the armistice intervened;

FOR THESE REASONS:

The Council, having heard the Commissioner of the Government, Van Gindertaelen, in his pertinent motions, rejecting all contrary claims as unfounded, and attesting that the Stoomvaart Maatschappij Nederlands Lloyd estimates the litigation at one million francs from the point of view of competence, declares effective and valid the capture of the steamer *Gelderland*, and decrees that it will belong in its totality to the Belgian State. Expense as in law.

## THE ROELFINA[1]

*Belgian Council of Prizes, 1919*

In case No. 54, sailing vessel *Roelfina*, the Council renders the following decision:

In view of the introductory petition presented by the Commissioner of the Government requesting that the capture of the sailing vessel *Roelfina*, of about 148 tons, formerly belonging to the firm Spliethof P. A. A. de Jonge of Rotterdam, be declared legal and valid for the benefit of the Belgian State;

In view of the other documents incorporated into the pleadings;

Whereas, M. Gaston Verougstraete, attorney, enrolled in the list of attorneys of Bruges, has presented himself in the name of the incorporated firm Nederlandsche Gist en Spiritus Fabriek;

Having heard the Assistant Commissioner of the Government, De Vos, as well as the said M. Verougstraete, in their respective pleas and motions;

Whereas, the sailing vessel *Roelfina*, flying a Dutch flag, was captured on July 4, 1917, on the high seas by a German submarine and escorted to the port of Bruges, and, whereas, it was declared a good prize by a judgment of the Prize Court of Hamburg;

Whereas, it follows therefrom that by virtue of a regular decision relating to the ownership and the flag, the vessel had become an enemy vessel and as such in principle subject to capture on the part of the Allied Powers from the moment when this decision intervened;

1. With regard to the claims of the Nederlandsche Gist en Spiritus Fabriek;

Whereas, this firm, of Dutch nationality, having its offices at Delft and a branch at Bruges, maintains that it has become the legitimate owner of the *Roelfina* by reason of having purchased the ship under date of October 12, 1918, from the German State, through the mediation of the delegated official of the Navy for prize matters, in consideration of the price of 13,000 marks, paid by it under the condition that according to it the absolute correctness of its acquisition should not be placed in doubt; whereas, it declares in effect that it has acted above everything in the interest of the Dutch shipowner Spliethof P. A. A. de Jonge of Rotterdam, dispossessed by the German authority, and to whom it proposed to offer the retrocession of the vessel at cost price without any profit for it; whereas, since the above-mentioned shipowner did not accept this offer, it remained the owner and in possession of the ship;

Whereas, while granting freely that the Nederlansche Gist en Spiritus Fabriek was led to make this acquisition for the disinterested motive that it alleges, while, however, nothing could lead it to believe that the Dutch shipowner would have agreed to run the risks of a repurchase, and while

[1] Translated from the *Moniteur Belge*, 1920, p. 403.

it has been admitted that the German authorities took the initiative in proceeding to the sale of the ship, still the alleged motive, should it be established, would be insufficient to give the intervening operation the character of validity required by international law.

Whereas, in fact, according to a principle which has always been universally admitted by all maritime nations, the transfer in time of war of an enemy vessel to a neutral flag is null in every case when it appears that the transfer was effected with a view to evading the consequences to which the enemy vessel would have been exposed by the action of a belligerent;

Whereas, in the case of the *Jan Frederik* (1801, 5 C. Rob. 128, 1 English P. C., 434), Lord Stowell, considering, it is true, especially transfer *in transitu* not followed by delivery, said: "As I have already observed, it has been decided in two or three cases that a transfer can take place *in transitu* when there is no actual state of war nor any perspective of war involved in the transaction of the parties; but in time of war it is prohibited as a vitiated contract, because it involves a fraud with regard to the rights of the belligerents not only in the particular transaction but in the general opportunity that it necessarily introduces of evading these rights without possibility of being discovered. It is a path which in time of war should be closed, for although honest people might be called to enter upon it with the most innocent intentions, the greater part of those who use it would do so only with sinister intentions and with a view of committing a fraud in regard to the rights of the belligerents"; whereas, it is quite clear that the same motives can be applied to other nations and especially to the case of a ship finding itself in a blockaded port, and these motives have in fact led to the same solution admitted in international law, that is to say, the absolute presumption of nullity of transfer.

"If the state of war or even the simple probability of war", Lord Stowell again says with regard to a transfer *in transitu* before the opening of hostilities, "leads immediately to the transfer or becomes the basis of a contract which would otherwise not have been entered upon by the vendor, and if it is known that this is the case in the mind of the purchaser, although with regard to him there could also be other concurrent motives, such a contract cannot be held valid, according to the same principle which invalidates a transfer *in transitu* in time of war. The nature of the contracts is identically the same, each of them aiming to protect property against capture in war, not, to be sure, against capture at the time when the contract was made but against the danger of capture when it is probable that this capture will take place. The object is the same in each case, namely, to secure a guarantee against the same cause, in other words, the two contracts were closed for the same purpose, that is to evade a right of the belligerent, present or eventual. The two contracts are both

closed *animo fraudandi* and are, in my opinion, rightfully subject to the same rule." (The war of 1914, British Naval Prize Jurisprudence, pp. 20 and 31.)

Whereas, the Declaration of London has adopted in substance the views of international law with regard to transfer, effected in time of war, of an enemy vessel to a neutral flag, such as have just been set forth, namely, that such a transfer is presumed to be null and that it devolves upon him who invokes it to disprove this presumption;

Whereas, Article 56 provides in fact: "The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed."

Whereas, in the present case not only the Nederlandsche Gist en Spiritus Fabriek has not furnished the proof which devolves upon it, but, whereas, it appears, on the contrary, that the transfer was effected with the manifest object of avoiding the danger of capture to which the *Roelfina* found itself exposed on the part of the military forces of the Allies while remaining in the waters of Bruges under the German flag, and as a result with a view to evading the consequences which its character as an enemy vessel might bring with it;

Whereas, on October 12, 1918, on which date the German State sold the ship to the Dutch firm, the general military situation, characterized especially by the breaking of the Cambrai—St. Quentin Front, was such that the German military authorities had to consider as probable the evacuation of Flanders and of the Belgian coast, which fact was moreover realized less than a week later as a result of the victorious offensive of the Franco-Belgian troops;

Whereas, the Nederlandsche Gist en Spiritus Fabriek in any case got a clear conception of the immediate motive which led the German authorities to sell the vessel to it, namely, because these authorities would without doubt have experienced difficulty in evacuating the interior waters in due time, and whereas thus, setting aside a concurrent motive which could moreover have guided the said firm and which is irrelevant in the present case, this firm found itself in agreement with the vendor in committing this fraud with respect to the rights of a belligerent, condemned both by international law and the Declaration of London;

Whereas, it was apparently because the said firm took into account the risk of its operation that it paid for the acquisition of the sailing vessel a price of only 13,000 marks, while this vessel was insured before its capture for the amount of 57,840 francs and after its acquisition the firm on its part insured it to the amount of 51,000 francs;

Whereas, according to the provisions of Article 56 of the Declaration of London the absolute presumption of the nullity of the transfer of flag exists if this transfer was effected in a blockaded port;

Whereas, the blockade may extend to the ports and coasts occupied by the enemy (Art. 1); whereas, it must be effective, that is to say, maintained by a force sufficiently large to prohibit in reality the approach to the enemy shore (Art. 2); whereas, the question of determining whether the blockade is effective is a question of fact (Art. 3); whereas, the blockade, in order to be binding, must be declared and made known in conformity with Articles 9, 11 and 16, and especially to the neutral Powers by means of a communication addressed to their governments or their accredited representatives;

Whereas, the rules above enumerated correspond in substance to the principles generally recognized by international law and are in harmony with modern practice as observed by most states;

Whereas, the English, American and Japanese doctrine require with regard to an effective blockade that a region be guarded by a sufficient force to render departure or entrance dangerous, or in other words, to render very probable the capture of vessels attempting entrance or departure, save under particular circumstances, such as storms, violent winds and necessary absence of the blockading forces; whereas, the distance at which these vessels are stationed is indifferent, provided access be in fact prohibited;

Whereas, according to a declaration in conformity with the stipulations of London and made known in a regular way to the neutral Powers, England decreed the blockading of the whole coast, including the port of Bruges, occupied by the enemy;

Whereas, this blockade was rendered effective and maintained until the armistice by a body of forces and of engines of naval warfare which had the effect of prohibiting in fact approach or departure from the ports of the Belgian coast;

1. Whereas, in the first place, the English mine-fields obstructed the whole North Sea as far as the coast S. E., and later from the entire coast of England as far as the west coast of Holland, leaving free only Dutch territorial waters, which were partially mined by the Dutch, and two narrow passages between England and Holland; whereas, these mine-fields were constantly guarded by numerous English cruisers which continually patrolled the southern part of the North Sea and whose blockading action was thus maintained by the presence of mines; whereas, moreover, in order to be able to navigate in the Dutch territorial waters an authorization and a Dutch pilot were necessary; whereas, this could not be done without certain difficulties in view of the examining vessels of war, located before Westkapelle and before Cadzand, controlling minutely such demands, and whereas, on the other hand, Belgian territorial waters, strewn in part with German mines, were only accessible through the authorization and the assistance of the Germans, necessary to guide a merchantman through the

mines; whereas, also, not a single case is known to the council of a vessel coming from the high seas and passing by Flessingue to go to Zeebrugge, and likewise the council does not know of any ship that entered the latter port coming directly from the open sea;

Whereas, the impediments caused to navigation not only by the Germans but also by the Dutch were of a nature to increase the danger of capture or of destruction for vessels attempting to violate the blockade;

2. Whereas, independently of the mines, the English maintained a close guard by a fleet of war vessels which had their naval bases at Dover, Dunkirk, Calais, Ramsgate, Sheerness, Southend, Harwich, Lowestoft, et cetera, which, created especially for the supervision of these districts, plowed the English Channel and the North Sea; whereas, the English even attacked by night some German torpedo boats which, having attempted to escape from Zeebrugge had to seek refuge at Ymuiden; whereas, at their departure from Ymuiden these torpedo boats were again attacked, during the night, by the English even into the Dutch territorial waters;

3. Whereas, the whole Belgian coast was frequently subjected to terrible bombardments at a long distance by the English monitors which, constructed especially for the bombardment of the Belgian coast, were equipped with 15-inch (38 cm.) cannon;

Whereas, although a violation of the blockade could only expose a vessel to seizure, it is hardly doubtful but that under these conditions of unsafety for navigation no vessel of commerce would have ventured to attempt entrance to or exit from the port;

4. Whereas, the Allies were still patrolling the whole Belgian coast both by day and night by means of formidable aeroplanes and airships, a new arm of the navy used as such by the Germans themselves;

5. Whereas, English submarines contributed equally to the blockade of the Belgian coasts;

6. Whereas, moreover, Germany, by its barbarous and inhuman practices of unrestricted submarine warfare, rendered safe navigation on the high seas impossible in fact; whereas, the German submarines, with almost rare exceptions, sank without distinction of flag, whether belligerent or neutral, all vessels which they encountered and without the least warning and without exposing themselves; whereas, when the unrestricted submarine warfare was declared (early in 1917), a number of neutral vessels found themselves in English waters; whereas, they were destined to neutral countries washed by the North Sea and its abuttals; whereas, after they had waited more than two months before being able to obtain the permission of the Germans to effect the passage of the North Sea, this permission was finally granted to them on days set in advance and with the understanding that the exterior sides of the vessels be previously painted with huge red and white vertical bands so as to be easily recognizable from the limited view of the periscope of a German submarine; whereas, every

vessel encountered and not being painted with these huge red and white bands was to be torpedoed, without quarter, and as far as possible, to use the expression of the German diplomat at Buenos Aires, "spurlos versunken"; whereas, it, therefore, goes without saying that every vessel found in the other waters from the said time on was to be torpedoed; whereas, the vessels which might have desired to make for a Belgian port or to depart therefrom were accordingly directly exposed to being torpedoed in default of being able to show any distinctive mark, and whereas, those which might have shown a distinctive mark sufficiently apparent for a periscope would not have escaped the vigilance of and capture by the Allied patrol boats;

Whereas, to sum up, the situation was such, that as soon as a vessel had left Dutch territorial waters, bound either north or south, it was confronted by an unknown fate in the waters infested by enemy vessels and engines, and not only exposed to torpedoing without the least previous warning of any kind whatsoever by a German submarine, from which not the least quarter could be expected, but also to capture by an Allied naval or aerial patrol;

Whereas, it follows from these considerations that the blockade of the whole Belgian coast and of the port of Bruges in particular, was effective at the time of the transfer of the *Roelfina* to a neutral flag and that this transfer was null by virtue of the absolute presumption resulting from the Declaration of London;

Whereas, the firm of Nederlandsche Gist en Spiritus Fabriek is not, therefore, justified in availing itself of the sale concluded between it and the German authorities on October 12, 1918, counter to the rights which the Belgian State bases upon the recapture of a vessel that has legally retained enemy character;

As to the claim of the French State made through diplomatic channels;

Whereas, the French State, through the mediation of the Executive Commission of Insurance against War Risks had, in the course of the year 1917 and independently of cargoes, insured the hull of the sailing vessel *Roelfina* for four-fifths of its agreed value, that is 50,840 francs;

Whereas, by the effect of its condemnation through a German prize tribunal, this ship has acquired enemy character, with regard to the belligerent who effected its recapture subsequently;

Whereas, for reasons developed by the judgments of this council in the cases of the steamships *Midsland* and *Gelderland*, as well as in the case of the sailing vessel *Agiena*, the latter under date of this day, the recapture made by the Belgian State under the aforesaid conditions was not a recapture "but a new prize, not obliging the recaptor to restitution with regard to the former neutral proprietor, definitively deprived of his right";

Whereas, this juridical situation could not be influenced by the circumstance that since the original capture the Dutch shipowner Spliethof P. A. A. de Jonge, proprietor of the vessel, has relinquished it with subrogation of its rights to the underwriter, the French State;

Whereas, in spite of the regret that the Belgian Prize Council may feel in being compelled to reject a claim formulated by a friendly nation which during the recent war has made the most noble effort for the triumph of the cause of civilization, and while leaving it to the Belgian Government to act upon the claim, if it is fitting, the council must needs, under pain of failing in its mission of limiting itself to judge in accordance with law, state in the present case that the French State could not have with regard to the recaptor, the Belgian State, more rights than the neutral shipowner had, whose assign it is; whereas, the recapture affected a neutral vessel at the moment of its original capture, the latter alone having to be considered in this case; and whereas, under any hypothesis, if the vessel should be considered an Allied vessel, its condemnation by the German prize court would not in any less degree hinder the obligation of restitution, as in the case of a neutral vessel;

Whereas, the conditions of the armistice, which were directed exclusively against Germany, could not have had as their object to deprive Belgium, an Allied Power, of the benefits acquired before the armistice by a capture which would bring about the dispossession of the enemy and which represents the exercise of a legitimate right confirmed on this day by a sentence of validity;

For these reasons:

The council having heard the Assistant Commissioner of the Government, De Vos, in his pertinent motions, rejecting all contrary claims as unfounded, and acknowledging to the Nederlandsche Gist en Spiritus Fabriek that it estimates the litigation at more than 20,000 francs, declares legal and valid the capture of the sailing vessel *Roelfina*, and decrees that this vessel shall belong in its totality to the Belgian State, Expenses as in law.

## *IN RE* THE UNITED COMBED WOOL SPINNING MILLS OF SCHAFFHAUSEN AND DERENDINGEN [1]

*French Council of Prizes*

Paris, March 29, 1917

In the name of the French people, the Council of Prizes.
In view of the decree of March 13, 1915;

[1] Translated from MS. in the Department of State.

In view of the memorandum of March 3, 1917, registered in the Office of the Secretary of the Prize Council on the 22nd of the same month, by the Minister of Marine Affairs, transmitting the report relative to the seizure at Havre of three boxes of woolen fabrics;

In view of the official report of February 23, 1917, according to which an officer, designated for that purpose by the Commandant of the Navy at Havre, declares that he seized in the railroad station at Havre three boxes of woolen fabrics shipped by the "United Combed Wool Spinning Mills at Schaffhausen and Derendingen," to wit—

Two boxes marked L. and C. Numbers 7879-80. Net weight—548 K., containing 1,460 meters;

One box marked L. and C. Number 7875. Net weight $-\frac{413 \text{ K.}}{961 \text{ K.}}$ containing $\frac{1157}{2617}$ meters; said cases addressed to Havre to the forwarding agency Marzolff and Co., to be loaded on the Dutch steamer *Ary Scheffer* and consigned to the firm Lichtenstein and Co., at Amsterdam:

In view of the telegram of February 6, 1917, from the Naval Attaché of the French Legation at The Hague conveying the information that the firm Lichtenstein is German:

Together with the documents of the report:

In view of the notice inserted in the *Official Journal* of March 23, 1917;

Having heard M. Rouchon Mazerat, member of the Council, *Judge-Advocate,* and M. Chardenet, Commissary of the Government, in his motions;

Considering that if, according to the terms of Article 7 of the decree of March 13, 1915, "the question of ascertaining whether the intercepted merchandise is merchandise belonging to German subjects or coming from Germany or shipped over Germany, is brought before the Prize Council," it appears from the provisions of said act that it can refer only to merchandise that has been loaded and seized on a vessel or in a warehouse detaining it:

Considering that the three aforementioned cases have on the contrary been seized, coming from Switzerland, in the railroad station of Havre before their embarkation on the Dutch steamer *Ary Scheffer;*

*Decides:*

The Prize Council is incompetent to render decision on the seizure in the railroad station of Havre of three boxes of woolen fabrics of Swiss provenience before they are sent on to a firm at Amsterdam which is reputed to be German.

## BOOK REVIEWS*

*America and the Race for World Dominion.* By A. Demangeon. New York: Doubleday, Page & Co., 1921. xiv+234 pp. $2.00.

Sensational enough in the principal thesis which it supported in the original European edition, and brilliant as was its style in the original French, this little volume has been made still more sensational in translation. Its title has been materially altered and a phrasing and diction have been adopted by the translator which are skillfully calculated to accentuate all of the startling ideas, or all phases of the one startling idea, which the author presents. This is a rather unusual thing to do, it may be supposed. To present a work originally conceived as dealing with "the decline of Europe" as a treatise on "America and the race for world dominion" may be good tactics in the publishing world; it is hardly good science.

For the author is primarily interested in, and he discusses, primarily, the former subject. Europe has, he believes, for some half a century now, but mainly as a result of the War, been losing her pre-eminence in the manufacturing world and, what is more important, her control of world commerce and world finance. Man-power has been lost by emigration and by war; credit has been squandered in the purchase of food and raw materials which could not be had in Europe, and even manufactured products began to be imported while all European production and finance were concentrated on war. No longer is Europe in a position to supply the world with capital, with colonists, with manufactured products. Her subject peoples are rising to throw off European domination. The non-European countries are preparing "to do without Europe." They dispute the idea that the world is to be unified with Europe as a centre; they hope for destruction of the European centralization and monopoly; they are bringing about "the dismembering of the European Empire."

Such a thesis, if true, means that we are witnessing, in our own day, and in the space of a half-century or a little more, a shifting of the centre of civilization in the world comparable only with that which worked itself out from the fourth century to the fourteenth in Europe itself, when the Mediterranean gave place to Northern and Central Europe as the centre of the world's life. And the thesis is convincingly presented by the Pro-

*The JOURNAL assumes no responsibility for the views expressed in signed book reviews.—ED.

fessor of Geography at the Sorbonne, with a wealth of statistical evidence which seems to leave in the mind of the American reader, at least, no room for doubt.

What, then, is to become of the predominance heretofore held by Europe? The title of the American edition implies that "world dominion" is to pass to America. One or two sentences in the book encourage this inference. "Financiers, manufacturers, and merchants (of the United States) work in unity, preparing the way for one another in all corners of the world where there is a part to play, or a market to conquer." "It is an economic offensive that has as its aim the chaining to the chariot of America of vast groups of human beings that until recently followed the fortunes of Europe."

Yet, on the whole, the author does not mean to say either that there is a deliberate "race" for dominion on the part of America and Europe, or that the "dominion" for which there exists, in the very nature of the situation, an unconscious competition, is that sharp type of legal or political dominion which we call imperialism. The "dominion" at stake is general economic power and cultural authority. Even such power, moreover, is not to pass to the United States intact. Japan receives almost as much attention from the author as does America. If the man-power, the financial power, the industry, the sea-power, and the commerce of America have increased in stupendous leaps in the last generation, and especially since 1914, so have the powers of Japan developed, until she dominates the Asiatic scene as the United States dominates the American. What is happening, in reality, is that America and Asia are each rising to assert their independence from Europe. Europe need not, and will not, go under the yoke, but will merely lose her hegemony of other years. The world is to be decentralized, to be "regionalized"; the Pacific will be "a new Mediterranean"; certain parts of the earth will centre about Japan, others about America, and, presumably, others about old Europe. "There will be no longer unity, but a plurality, of influences." (This is very far from American dominion.)

This volume thus registers a turning point in world history as important as the Renaissance and the downfall of Rome together. It is the story in miniature of the decline and fall of the Empire of Europe, of the birth of Asia and America as distinct centres of the world's life.

PITMAN B. POTTER.

*Le Droit des Gens et les Rapports des Grandes Puissances avec les autres États avant le Pacte de la Société des Nations.* By Charles Dupuis. Paris: Plon-Nourrit, 1921, pp. 544.

The author tells us in his Preface to this interesting volume, that he wrote most of it at the request of the Nobel Committee of Peace (of the

Norwegian Parliament); but the state of war prevented its publication in due time and the author was forced, adding a few chapters, to publish it himself two years later. His main object, in writing this book, was to describe the history of the growth and strength of the great powers and of the parallel development of international law and organizations, curbing and limiting that strength and gradually creating a whole system of guarantees for the smaller and weaker nations; he gives us an excellent picture of the curtailments and restrictions imposed upon the State Sovereignty, which formerly was the expression of state selfishness only. The crowning success of this movement the author sees in the establishment of the League of Nations.

The first chapter deals with the difficult question of the equality of states, their natural inequalities, the political strife between might and right, and the real meaning of sovereignty and independence, as they developed among the European states. Chapters II and IV are devoted to the history of the great powers; the author eloquently tells the story of the amazing growth of a few states, who played a leading part mostly on account of their tremendous strength; perhaps even too many details are given in these chapters, as much of the ground has been so thoroughly covered by other historians. Chapter III deals with the ideas of sovereignty and independence in their international aspects and was probably meant to be the center of his investigation; a trifle more precision would not have harmed. In Chapter V we find the discussion of the old question of federations and confederations, with reference mostly to Germany and to the fate of the smaller nations. Then follows (Ch. VI-VII) the history of permanent neutrality and of the protectorates; this last chapter has much valuable information, as well as the following one (VIII) on international finance and the Drago Doctrine.

The treatment of the difficult questions concerning international finance leaves much to be desired; the time has not yet come for a detailed investigation and it will take probably many volumes devoted entirely to the subject. Chapter IX deals with the Monroe Doctrine and might be of some interest, as it reflects an impartial European view of the matter. The author's views of the subject are further developed in Chapter XI, dealing with "Pan-Americanism and the Bryan Treaties;" these two chapters contain interesting information for European readers. Chapter X, devoted to the Hague Peace Conferences, on the contrary, re-states well known facts and conclusions. Finally in Chapter XII are enumerated the projects of international organizations that might have a direct bearing on contemporary events and policies. The last Chapter (XIII), dealing with the existing and possible guarantees of the rights and interests of the smaller and weaker nations, seems rather vague and perhaps even a little incoherent; it makes the impression that the writer was in a great hurry and did not quite digest his own conclusions. He discusses at length the

"International Spirit" of the great powers, not always drawing the necessary line between theories and questions of fact, personal postulates and historical events; the reader does not get any definite idea of the author's own point of view; neither do we find here any clear formulæ of international law; maybe, however, in this latter case, it is not quite the fault of the author; contemporary history is not conducive to such indisputable definitions and no one can yet predict the future fate of the League of Nations. The author, at least, seems to believe in its future and final success.

S. A. KORFF.

*Letters to "The Times" upon War and Neutrality, 1881-1920,* with some commentary. By Sir Thomas Erskine Holland, K.C., D.C.L., F.B.A. Third edition. London: Longmans, Green and Company, 1921. pp. xv+215. $4.00.

Sir Erskine, as I believe he prefers to be known, there being another Sir Thomas Holland, may perhaps be considered the dean of British students of international law. He was born in 1835 and is now therefore eighty-six years of age. From 1874 to 1910, a period of thirty-six years, he served with great distinction as professor of International Law at Oxford. He has, in full vigor of mind, survived his eminent and gifted contemporaries, Westlake and Oppenheim, of Cambridge. He has well earned and won the blue ribbon of international law, the presidency of the *Institut de Droit International* and received honors from his own and many sovereigns and from universities and learned societies the world over, including honorary membership in the American Society of International Law. Today he stands *facile princeps* among English scholars in this great and useful branch of learning. His publications are many and their authority beyond question.

Therefore this little book of 215 pages from his hand deserves our especial attention.

The first edition appeared in 1909, and in the preface he said:

> For a good many years past I have been allowed to comment, in letters to "The Times," upon points of International Law as they have been raised by the events of the day. These letters have been fortunate enough to attract some attention both at home and abroad, and requests have frequently reached me that they should be rendered more easily accessible.

He accordingly selected from a greater number those on "questions of War and Neutrality," and published them. He published a second edition with many new letters in 1914, saying in the preface:

> I have no reason to complain of the reception which has so far been accorded to the views I have thought it my duty to put forward.

In the preface to the present and third edition, dated April 25, 1921, he says:

> This, doubtless, final edition of my letters upon War and Neutrality contains. . . the whole series of such letters covering a period of no less than forty years."

The explanatory commentaries have been carefully brought up to date, all have been fully indexed and the little volume is presented in the belief that "not a few of these questions are sure again to come to the front so soon as the rehabilitation of International Law, rendered necessary by the conduct of the late war, shall be seriously taken in hand."

The letters number 113 in all. They are brief, ranging from half a page to four or five pages. They are clear and not hesitant in tone. It must be added that they quite uniformly display ripe scholarship and sound judgment. Thoughtless, raw and dangerous change is strongly combated, but the process of evolution and adjustment to new conditions is fully recognized and supported. The American doctrines excite, on Sir Erskine's part, no hostility, but on the other hand often meet with what Emerson calls a "manly furtherance." For instance, in 1900 he declared that the innovations made during the American Civil War on the doctrine of continuous voyage seemed "to be demanded by the conditions of modern commerce and might well be followed by a British prize court," and he had the satisfaction to see these words referred to by Lord Salisbury eight days later. He shows, moreover, that our doctrine, so much decried by European writers, was adopted by an Italian court in 1896 and by the British Government in 1900 (see p. 161) and endorsed, after long discussion, by the *Institut de Droit International* in 1896.

"The deceased Declaration of London," as he calls it (p. 92), which gave such satisfaction to those who shaped it and which met with such general disaster thereafter, Sir Erskine consistenly regarded with great distrust and almost animosity. He repeatedly records its failure to obtain ratification and the utter breakdown, as a rule for action, of even those portions of its enactment temporarily approved during the late war. He deemed it "nothing more than an objectionable draft by which no country has consented to be bound." He quotes Lord Portsmouth's description of it as "rubbish" with hearty agreement, and shows that an order in council of 1916 revoked all orders by which provisions of the declaration were adopted or modified for the duration of the war. He shows further that the French Government joined the British Government in declaring that they had been disappointed in the expectation of finding in the declaration "a suitable digest of principles and compendium of working rules" (p. 207).

Sir Erskine recognizes the League of Nations as "a brave design," but finds it a serious mistake to "combine in one and the same document provisions needed for putting an end to an existing state of war with other

provisions aiming at the creation, in the future, of a new supernational society'' (p. 7).

Sir Erskine does not shrink from controversy, but he conducts it with dignity, courtesy, and, it must be added, remarkable success, as many eminent contestants discovered who crossed swords with him in these intellectual encounters, *par example*, Mr. Gibson Bowles and Mr. Baty.

I am tempted to quote a gallant passage, one of many, in support of the claims of international law. Here it is:

> The ignorance, by the by, which certain of my critics have displayed, of the nature and claims of international law is not a little surprising. Some seem to identify it with treaties; others with ''Vattel;'' several having become aware that it is not law of the kind which is enforced by a policeman or a county court bailiff, have hastened, much exhilarated, to give the world the benefit of their discovery. Most of them are under the impression that it has been concocted by ''book worms,'' ''jurists,'' ''professors'' or other ''theorists,'' instead of, as is the fact, by statesmen, diplomatists, prize courts, generals and admirals.

This admirable work in its new edition will assuredly continue, as in the past, to be referred to as a valued and high authority. Too much cannot be said of the happy combination of comprehensive, but not pedantic learning, extending to the most recent decisions and acts even of remote and foreign powers, with sound, sober, cautious judgment. Nor can the courage and tenacity be overlooked with which just and needed corrections of popular action or feeling have been attempted and often achieved, when such attempt involved much criticism and hostile feeling, from persons perhaps as patriotic but less wise and thoughtful than Sir Erskine. He fully appreciates, as do most of those who devote years to its study and development, the many imperfections in the law of nations, the many difficulties in its exact ascertainment and enforcement. But such long and deep study and acquaintance has no less assured him of its noble purpose, its vast scope and its profound effect as an aid to justice and to humanity. Long may he continue its wise exponent, its brave and effective defender!

CHARLES NOBLE GREGORY.

*Treaties and Agreements with and concerning China, 1894-1919.* By John V. A. MacMurray, Compiler and Editor. New York: Oxford University Press, 1921. 2 vols., pp. 1729. Publication of the Carnegie Endowment for International Peace, Division of International Law. $10.00.

These two massive volumes constitute one of the most valuable of the publications of the Carnegie Endowment. They represent an immense amount of labor upon the part of their compiler and editor. The reviewer has only admiration and gratitude for the painstaking and intelligent care

with which this labor has been performed. No one not familiar with conditions in China can form an adequate idea of the necessity for such a work as this. In this connection the reviewer ventures to quote words which he used in the introduction to a volume published by him in 1920 dealing with foreign rights and interests in China. He then said of China:

> Probably nowhere else in the world is there such a mixture of territorial rights with foreign privileges and understandings, of purely political engagements with economic and financial concessions, of foreign interests conflicting with one another and with those of the nominally sovereign State. When a national government is wholly untrammelled with regard to the management of its own domestic affairs and has within its own hands the enforcement of law within its own territorial borders, international rights and responsibilities are easily determined by a resort to well-established principles of public law. But when, as in the case of China, we have a Power which permits the exercise within its limits of all kinds of extraterritorial rights and privileges; when there exists within its territory spheres of interest, special interests, war zones, leased territories, treaty ports, concessions, settlements and legation quarters, when there are in force a multitude of special engagements to foreign Powers with reference to commercial and industrial rights, railways and mines, loans and currency; when two of its chief revenue services—the maritime customs and the salt tax—are under foreign overhead administrative control or direction; when the proceeds of these and other revenues are definitely pledged to meet fixed charges on foreign indebtedness; when, at various points within its borders, there are stationed considerable bodies of foreign troops under foreign command—when we have these and other phenomena all carrying with them limitations upon the free exercise by the central government of its ordinary administrative powers or its discretionary right to deal as it deems best with the individual nations with which it maintains treaty relations, we then have a condition of affairs which furnishes abundant material not only for theoretical or academic discussions by students of international jurisprudence, but for serious conflict and disputes between the nations concerned.

Mr. MacMurray, in his volume, has followed much the same principles of selection as those used by W. W. Rockhill in his collections published by the United States Government in 1904 and 1908, except that the arrangement is a strictly chronological one. In addition to treaties and other formal international agreements, less formal declarations and arrangements, loan and railway and mining and other agreements have been included, and valuable footnotes, by way of cross-references, indicate the relations between the several documents. In all cases the English text is given.

Beside seven valuable maps, and an elaborate index, there is a chronological list of the documents at the front of the first volume; there is a similar list arranged according to nationalities.

Mr. MacMurray's volumes supersede Rockhill's two volumes, but, for the period prior to 1894, one must still consult Hertslet's *Treaties between Great Britain and China and Foreign Powers* (3d ed., 2 volumes, 1908) and *Treaties, Conventions, etc., between China and Foreign States* (2d ed.,

2 volumes, 1917), published by the Inspector General of the Chinese Maritime Customs.

Of Mr. MacMurray personally, it may be said that he has had a considerable number of years' service in the American diplomatic service, much of which has been in the Far East—in Siam, China, and Japan. In Peking he was First Secretary of the American Legation, and in Tokio, Counselor of Embassy. During the last few years he has been Chief of the Division of Far Eastern Affairs in the Department of State, and was the official upon whom Secretary Hughes chiefly relied in preparing for and conducting the recent Conference on Far Eastern Affairs at Washington. It is to be hoped that from time to time Mr. MacMurray will be led to compile, and the Endowment to issue, supplementary volumes that will include treaties and agreements with or relating to China since 1919.

W. W. WILLOUGHBY.

*Handausgabe der Reichsverfassung vom 11 August, 1919.* By Dr. Fritz Poetzsch. 2d ed. Berlin: Otto Liebmann, 1921. pp. 226. 17 marks.

This is a type of legal publication common in Germany before the war. It is chiefly a brief commentary, section by section, upon the new constitution of the German Commonwealth. Preliminary chapters discuss the history of the constitution and the characteristics of the new organization created thereby. The author takes the view that in its new form the German Commonwealth is more nearly a unitary state than a federal state. American readers will be particularly interested in the author's comments upon the enlarged powers of the central government, and upon the popular basis of the new government. The experience of the German Government with proportional representation and the referendum will be watched with interest.

In connection with this volume, attention may be called to the excellent translation of the German constitution, made by Professors William B. Munro and Arthur N. Holcombe, and published in the *League of Nations,* Vol. II, No. 6 (Boston, December, 1919). An article on the new German constitution, by Prof. Ernst Freund, appeared in the *Political Science Quarterly* for June, 1920 (Vol. 35, page 117). Prof. Freund gives an excellent analysis of the new institutions and the new principles established for the German Government under its republican form of organization. The republican constitution of Germany contains a number of declarations of broad principles of social justice, and seeks to lay the foundation for a broadly democratic political system. However, the constitution must be regarded for a time at least as chiefly a promise of a new type of government and of new principles. The future must see the fulfillment of this promise, for no constitutional text in and of itself vitally changes political institutions.

W. F. DODD.

*The Question of Aborigines in the Law and Practice of Nations.* By Alpheus Henry Snow. New York: G. P. Putnam's Sons. 1921. pp. 376.

The death of Mr. Snow on August 19, 1920, was a distinct loss to scholarship in the field of international law. During many years he had contributed to scientific publications articles dealing with matters of public law, a number of which have now been collected in a volume entitled "The American Philosophy of Government." In 1902 he published a volume on "The Administration of Dependencies" which bore the subtitle of "a study of the evolution of federal empire, with special reference to American colonial problems." The volume is a constructive examination of the powers of Congress and of the President in the government of American territorial possessions, and is a valuable contribution to the theory and practice of American constitutional law.

The present volume, reprinted posthumously, is the last study from the author's pen. It was originally written in the form of a monograph at the request of the Department of State in the spring of 1918, and was intended, like other studies undertaken at the time, for the guidance of the American delegates at the conference which would settle the issues of the war. The author had practically a clear field before him. As he expresses the situation in his prefatory note, there was "no treatise on the question, nor even any chapters in any book on international law or the law of colonies, to serve as a model or a guide."

The chapters of the volume discuss in succession the relation of wardship between aborigines and the state which exercises sovereignty over them, the rights recognized as belonging to aborigines, the duties of their guardian states, the legal effect of agreements between civilized states and aborigines, and the provisions of the Berlin-African Conference, as well as international action since the Berlin Conference, in particular the provisions of the Algeciras Conference with regard to Morocco.

From the outset a distinction must be made between the provisions of international law with regard to aborigines and the provisions of the municipal law of the several states. On this point the title of the monograph is somewhat misleading, as is also the arrangement of the material of the volume. The provisions of international law proper on the subject are exceedingly restricted, consisting in certain general principles stated in treaties and conventions, such as the act following the Berlin Conference of 1885, to the effect that the signatory powers recognized the obligation to watch over the preservation of the native tribes and to care for the conditions of their moral and material well-being. More definite duties of protection are to be seen in the guarantees of freedom of conscience and religious toleration to be enjoyed by the natives, and of freedom of activity on the part of religious and charitable institutions without distinction or

creed or nationality. The author is not sufficiently careful to distinguish such provisions adopted for the benefit of the natives from other provisions, such as those forbidding commercial monopolies in Central Africa and providing for freedom of trade and transit, which were adopted for the benefit of citizens of the signatory powers. The special provisions adopted for the suppression of the slave trade form a class by themselves. The doctrine of "intervention for humanity" is discussed by the author in a separate chapter, but it would seem to have no direct bearing upon the subject, since the protection of aborigines does not appear in any of the cases cited to have been the motive which induced the guardian state to assume sovereignty over the territory. The instance of Cuba scarcely seems in point, while the admirable provisions of the Philippine Government Acts of 1902 and 1916 had no part in the causes of the intervention.

In addition to the limited provisions of international law there is the large body of legislative provisions adopted by the voluntary action of the several states in possession of territories occupied by aborigines. These provisions of national public law as distinct from international law are discussed in detail by the author, beginning with the treaties entered into by the United States with the Indian tribes which have been treated as "domestic dependent nations" and as "wards of the nation." The provisions of the Philippine Government Act of 1902 established a form of government designed not for the satisfaction of the United States but "for the happiness, peace and prosperity of the people of the Philippine Islands." The volume goes on to review British, French, German, and other foreign legislation with respect to the administration of colonies and their aboriginal inhabitants.

Mr. Snow's volume collects together much valuable material not otherwise readily accessible. Apart from possible defects of arrangement it is a thorough and careful study of a subject which must form an important problem of international law for some time to come. One can only speculate how far the American delegates were influenced by its pages in laying down the provisions of Article XXII of the Covenant of the League of Nations. Whether or not the mandates under the League shall prove to have been administered in the spirit of these provisions, it would seem that the author is fairly justified in asserting that the conscientiousness and zeal with which the United States has fulfilled its duty of tutorship in the case of the Philippine Islands entitle it "to take the lead in any future development of the law of nations in this respect."

C. G. Fenwick.

*A History of Sea Power.* By William Oliver Stevens and Allan Westcott. New York: George H. Doran and Company, 1920, pp. xi+458.

This is a comparatively brief and concise work upon the influence of sea power from the earliest days until the present time. It serves a need as a text book upon the subject for the Naval Academy as well as presenting to the general reader and to the student of naval history a most excellent and consecutive work upon the subject.

Although a reference and discussion of the Maritime Codes of the Mediterranean and North Seas would be of interest to a reader upon the subject, it is not strictly germane to the purpose of the book except as regulators of the sea strength which is an element in the development of the sea power of the nations of the world. In fact the authors touch but lightly upon the regulation of the sea power by maritime or international law in peace time and war.

As to the partition of the high seas made by the Pope of Rome directly after the return of Columbus, it does make mention as an event allied both to naval history and to the freedom of the seas by an assumption of territorial jurisdiction which even there was recognized as unjustifiable. In reference to this the authors say:

> A Papal bull of May 4, 1493 conferred upon Spain title to all lands discovered or yet to be discovered in the Western Ocean. Another on the day following divided the claims of Spain and Portugal by a line running North and South "100 leagues west of the Azores and the Cape Verde Islands" (an obscure statement in view of the fact that the Cape Verdes lie considerably to the westward of the other group) and granted to Spain a monopoly of commerce in the waters west and south (again an obscure phrase) of this line, so that no other nation could trade without license from the power in control. This was the extraordinary Papal decree dividing the waters of the world. Small wonder that the French King, Francis I, remarked that he refused to recognize the title of the claimants till they could produce the will of Father Adam, making them universal heirs; or that Elizabeth, when a century later England became interested in world trade, disputed a division contrary not only to common sense and treaties but to "the law of nations."

An interesting reference is made to the Sea Beggars of Holland and the North acting under letters of marque first issued by Louis of Nassau, brother of William of Orange. It was no uncommon practice for them to go over the rail of a merchant ship with pick and axe and kill every Spaniard on board. In 1569, William of Orange, however, appointed Seigneur de Lambres as admiral of this fleet and issued strict instructions to him to secure better order, avoid attacks on vessels of friendly and neutral states, enforce the articles of war, and carry a preacher on each ship.

During the Napoleonic War in December, 1800, the convention forming the Armed Neutrality of 1800 came into being, composed of Russia, Prussia, Sweden and Denmark, who pledged themselves to resist infringe-

ments of neutral rights, whether by extension of contraband lists, seizure of enemy goods under neutral flags, search of vessels declared innocent by their naval convoy, and by other methods not unfamiliar in our own times.

In 1807, as a consequence of the Treaty of Tilsit, France was at liberty to take possession of the Danish fleet, then of considerable size, and use it against England. As a result and as a matter of self preservation, the attack upon the fleet and batteries of Copenhagen followed, the description of this engagement by the English fleet under Hyde Parker, of which fleet Nelson was the soul, being given fully. As to the international law of the matter, Dr. Stowell in his recent work upon Intervention, tersely and wisely says in his belief "that any intelligent government would disregard the neutrality of a power too weak to prevent itself from becoming an involuntary instrument for the carrying out of the enemy's designs."

There are interesting references to the large re-export trade of the United States from the West Indies, only exceeded in 1915, to the revival of the doctrine of continuous voyages in the civil war and world war and a chapter on the commerce warfare of the world war, which brings the book up to date both in time and maritime warfare. The book is well and accurately written and of great interest to students in naval warfare and naval history.

CHARLES H. STOCKTON.

# PERIODICAL LITERATURE ON INTERNATIONAL LAW SUBJECTS.*

Abbreviations: American Bar Association Journal (*Amer. Bar. Ass. J.*); American Law Review (*Amer. L. R.*); American Political Science Review (*Amer. Pol. Sc. R.*); Archiv des öffentlichen Rechts (*Arch d. öffentl. Rechts*); Canadian Law Times (*Can. L. T.*); Harvard Law Review (*Harvard L. R.*); Hispanic American Historical Review (*Hispanic Amer. Hist. R.*); North American Review (*N. Amer. R.*); Revue de Droit International et de Legislation Comparée (*R. Dr. Inter. et Legis. Comp.*); Revue Générale de Droit International Public (*R. Gen. de Dr. Inter. Public*); University of Pennsylvania Law Review (*Pa. U. L. R.*); Yale Law Journal (*Yale L. J.*).

*Aaland Islands.* La Question des Iles d'Aland. Fernand de Visscher. *R. Dr. Inter et Legis. Comp.*, 1921. *3rd series. 2*:35, 243.

*Alien enemy property.* Law of Nations and United States Treaties. Joseph Whitla Stinson. *Amer. L. R.*, Nov.-Dec., 1921. *55*:877.

*Anglo-American Relations.* Anglo-American Faith. William McClellan. *N. Amer. R.* Sept., 1921. *214*:306.

*Armament Limitation.* More perfect peace. Sherman Miles. *N. Amer. R.* Nov., 1921. *214*:577.

———. Sea Power and Disarmament. A. W. Hinds. *N. Amer. R.* Nov., 1921. *214*:588.

*Balkans.* Jugoslavia Today. Pierre de Lanux. *N. Amer. R.* Dec., 1921. *214*:741.

*British Empire.* Die neue Regierungsform im englishen Weltreich. A. Mendelssohn Bartholdy. *Arch. d. öffentl. Rechts. 41*:87.

*Canada.* Canadian Reciprocity Again? D. M. LeBourdais. *N. Amer. R.* Dec., 1921. *214*:751.

*Central America.* The New. Mary Wilhelmine Williams. *N. Amer. R.* Sept., 1921. *214*:297.

*Civil Law Codes' Growth.* The Napoleon Centenary's Legal Significance. Charles S. Lobingier. *Amer. L. R.* Sept.-Oct., 1921. *55*:665; *Amer. Bar Ass. J.* Aug., 1921. *7*:383.

*Columbia-Venezuela.* L'indivisibilité de la Frontière et le Conflit Colombo-Vénézuélien. A. de Lapradelle et N. Politis. *R. Gen. de Dr. Inter. Public.* Jan.-Apr., 1921. *28*:107.

*Dantzig.* Le Statut International de. Camille Piccioni. *R. Gen. de Dr. Inter. Public.* Jan.-Apr., 1921. *28*:84.

*France-Monaco.* Le Nouveau Traité Franco-Monégasque. Robert Ruzé. *R. Dr. Inter. et Legis. Comp.* 1921. *3rd series, 2*:330.

*Germany.* Die Regierungsbildung im Deutschen Reich und seinen Ländern nach den Vorschriften der gegenwartig gültigen Verfassungen. Dr. Adelheid Meuschel. *Arch d. öffentl. Rechts. 41*:1.

*(Limited to articles published in the periodicals exchanged with the AMERICAN JOURNAL OF INTERNATIONAL LAW.)

*Institute of Politics.* The. Lectures and Conferences. Charles G. Fenwick. *Amer. Pol. Sc. R.* Nov., 1921. *15*:539.

*International Court.* La Cour de Justice Internationale. Maurice Bourquin. *R. Dr. Inter. et Legis. Comp.*, 1921. *3rd series, 2*:17.

*International Law.* Admiralty and Maritime Law. John D. Grace. *Amer. L. R.*, Sept.-Oct., 1921. *55*:641.

———. Control of American Foreign Relations. J. Whitla Stinson. *Can. L. T.*, Oct., 1921. *41*:586.

———. The Law Relating to the Air. O. M. Biggar. *Can. L. T.*, Nov., 1921. *41*:667.

———. Validity and Effects of Contracts in the Conflict of Laws. Ernest G. Lorenzen. *Yale L. J.*, Nov., 1921. *31*:53.

*League of Nations.* Admission dans la Société des Nations et Reconnaissance de Jure. Jules Coucke. *R. Dr. Inter. et Legis. Comp.*, 1921. *3rd series 2*:320.

———. L'Admission des Nouveaux de la Société des Nations. Georges Scelle. *R. Gen. de Dr. Int. Public.* Jan.-Apr., 1921. *28*:122.

———. Les Débuts de la Société des Nations. Paul Hymans. *R. Dr. Inter. et Legis. Comp.*, 1921. *3rd series 2*:5.

———. De L'Utilite d'une Juridiction spéciale pour le règlement des Litiges intéressant les services de la Société des Nations. P. Grunebaum-Ballin. *R. Dr. Inter. et Legis. Comp.*, 1921. *3rd series 2*:67.

———. La Revision du Pacte de la Société des Nations. Henri A. Rolin. *R. Dr. Inter. et Legis. Comp.*, 1921. *3rd series 2*:57, 225.

———. Pan Americanism and the League of Nations. M. de Oliveira Lima. *Hispanic Amer. Hist. R.*, May, 1921. *4*:239.

———. Report on the Unification of the Laws of Different Countries relating to Bills of Exchange. J. A. Barboza Carneiro. *Can. L. T.*, Oct., 1921. *41*:581.

———. Le Rôle de la Société des Nations en matière de Communication et de Transit. Jean Hostie. *R. Dr. Inter. et Legis. Comp.*, 1921. *3rd series 2*:83.

*Mexican Constitution of* 1917. Confiscatory Phases. R. B. Gaither. *Amer. L. R.*, July-Aug., 1921. *55*:481.

———. Some Social Aspects of the. N. Andrew N. Cleven. *Hispanic Amer. Hist. R.*, Aug., 1921. *4*:474.

———. The Texas Company's Amparo Case. Edward Schuster. *Amer. Bar. Ass. J.*, Nov., 1921. *7*:583.

———. The Writ of Amparo under Mexican Law. Benito Flores. *Amer. Bar. Ass. J.*, Aug., 1921. *7*:388.

*Monroe Doctrine as a Regional Understanding.* Julius Klein. *Hispanic Amer. Hist. R.*, May, 1921. *4*:249.

*Nationality.* La Nationalité d'Après les Traités de Paix qui ont mis fin à la Grande Guerre de 1914-1918. J. P. Niboyet. *R. Dr. Inter. et Legis. Comp.*, 1921. *3rd series 2*:285.

*Poland.* La restauration de la Pologne et la Diplomatie Europeenne. Joseph Blociszewski. *R. Gen. de Dr. Inter. Public.*, Jan.-Apr., 1921. *28*:5.

*Self-Determination.* Nationalités et États. Louis Le Fur. *R. Dr. Inter. et. Legis. Comp.*, 1921. *3rd series 2*:193.

*Versailles Treaty.* Sovereign Colonies. T. Baty. *Can. L. T.*, Nov., 1921. *41*:677.

———. Les Traites de paix et les idées courantes en matière d'extradition. Maurice Travers. *R. Dr. Inter. et Legis. Comp.*, 1921. *3rd series 2*:125.

———. The Allied Demand on Holland for the Kaiser. R. Floyd Clarke. *Amer. L. R.*, July-Aug., 1921. *55*:558.

HOPE K. THOMPSON.